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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 3, 1990
CERTIORARI GRANTED NOVEMBER 13, 1990

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RELEVANT DOCKET ENTRIES

DATE	No.	PROCEEDINGS
1988		
Aug. 2	1	Indictment filed
Aug. 22	5	Federal Public Defender appointed Defendant arraigned on August 17, 1988, entered pleas of not guilty
Aug. 25	6	Order of August 23, 1988, that defendant be detained
1989		
May 23		Defendant rearraigned on May 17, 1989: guilty counts 2 and 3, not guilty count 1
July 10	13	Sentencing Memorandum of United States
July 26	14	Judgment as to Defendant
July 31	15	Notice of Appeal
Oct. 25	18	Order of October 24, 1989, designating place of confinement
1990		
May 30	20	Order of Judgment of U.S. Court of Appeals for the Fourth Circuit affirming in part, reversing and remanding in part
July 31	21	Defendant resentenced July 26, 1990 July 31, 1990, grounds privileges and community custody order
Sept. 26	22	July 26, 1990, Resentencing Judgment and Commitment as to Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-88-0252

UNITED STATES OF AMERICA

v.

THOMAS BRAXTON

(Attempt to Murder Deputy U.S. Marshals, 18 U.S.C. § 1114; Assault on a Federal Officer, 18 U.S.C. § 111; Use of a Firearm During a Crime of Violence, 18 U.S.C. § 924(c); Aiding and Abetting, 18 U.S.C. § 2).

INDICTMENT

The Grand Jury for the District of Maryland charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

did willfully attempt to kill Joseph Jenkins, Mark Shealey, Thomas Carruthers and Darryl A. Kelley, deputies of the United States Marshal Service, Department of Justice, while said deputies were engaged in and on account of the performance of their official duties.

18 U.S.C. § 1114

18 U.S.C. § 2

COUNT TWO

And the Grand Jury further charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

did willfully and forcibly, with a deadly and dangerous weapon, assault, oppose, impede, intimidate and interfere with Joseph Jenkins, Mark Shealey, Thomas Carruthers and Darryl A. Kelley, Deputy United States Marshals, Department of Justice, while said deputies were engaged in and on account of the performance of their official duties.

18 U.S.C. § 111

18 U.S.C. § 2

COUNT THREE

And the Grand Jury further charges:

On or about June 10, 1988, in the State and District of Maryland,

THOMAS BRAXTON

knowingly did use and carry a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is a violation of 18 U.S.C. Section 111.

18 U.S.C. § 924(c)

18 U.S.C. § 2

A TRUE BILL:

Foreperson

BRECKINRIDGE L. WILLCOX
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Docket No. JFM-88-0252

(Title Omitted in Printing)

TRANSCRIPT OF REARRAIGNMENT
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

* * * *

[3] PROCEEDINGS

(Call to Order of the Court)

THE CLERK: This Honorable Court will resume its session. The Honorable J. Frederick Motz is presiding.

THE COURT: Good afternoon.

MR. CRIBARI: Good afternoon, Your Honor.

MS. RINGLER: Good afternoon, Your Honor.

THE COURT: Ms. Ringler?

MS. RINGLER: Thank you, Your Honor. The Government calls the case of United States versus Thomas Braxton, Criminal Number 88-0252. It is my understanding from speaking with Mr. Cribari that Mr. Braxton, at this time, wishes to change his plea as to Counts Two and Three of the Indictment pending against him. There is no plea agreement with the United States Attorney's office.

THE COURT: All right.

MS. CRIBARI: Your Honor, that's correct.

THE COURT: No plea agreement. Okay? Ms. Turner?

THOMAS L. BRAXTON, DEFENDANT, SWORN

THE CLERK: Sir, would you please state your name for the record?

THE WITNESS: My name is Thomas Louis Braxton.

THE CLERK: And would you state your age and your date of birth?

THE WITNESS: My age is 39. My date of birth [4] 7/1/49.

THE CLERK: Sir, on August 17, 1988, you were—'88, is that the correct date?

THE COURT: '88, that's correct.

MS. RINGLER: That's correct.

THE CLERK: You were arraigned, and at that time you plead not guilty to a three count indictment. Do you wish to change your plea at this time?

MR. CRIBARI: At this time, we wish to change the plea on Counts Two and Three. Those are the assault counts and the handgun counts, only, to a plea of guilty. My records indicate that the arraignment was on August 19th, not August 17th.

THE CLERK: All right.

MR. CRIBARI: And we would like to leave our not guilty plea existing on Count One of the attempted murder count.

THE CLERK: Thank you very much.

THE COURT: All right. Mr. Braxton, before I accept your plea, I have to ask you some questions. Now, if you don't understand any of my questions, at any time, let me know. All right?

THE WITNESS: Yes, sir.

THE COURT: Now, you understand that you're under oath so that if you knowingly give a false answer to any [5] question, you could be prosecuted for perjury?

THE WITNESS: Yes, sir.

THE COURT: Okay.

EXAMINATION BY THE COURT

BY THE COURT:

Q How far have you gone in school?

A Twelve years of college. A little over 12 years of college.

Q Can you read and write?

A Yes, sir.

Q In the last 24 hours, have you taken any drugs? In that case—

MR. CRIBARI: Your Honor, Mr. Braxton takes Prolixan every night at St. Elizabeth's and is under the care of doctors, psychiatrists, psychologists, and medical doctors at St. Elizabeth's Hospital which, I guess, is within the District of Columbia. Other than his medication, he has taken no drugs, but he does receive that medication every night.

BY THE COURT:

Q Now, with those drugs do you understand what's going on a day? Is your medication affected you in any way to prevent you from understanding what's happening today?

A No, sir.

Q Have you consumed any alcohol in the last 24 hours?

[6] A No, sir.

Q Are you satisfied with the services that Mr. Cribari has given to you as your lawyer in this case?

A Yes, sir. I am.

Q Now, I'm going to go over the charges with you to make sure that you understand what they are. Now, you've received a copy of the Indictment and reviewed it with Mr. Cribari, haven't you?

MR. CRIBARI: That's this.

THE COURT: That's the charge.

MR. CRIBARI: That is what we went over last summer. Do you remember that?

THE WITNESS: Right, yeah. Yes, sir. I have a copy of that. I had a copy.

BY THE COURT:

Q Now, in Count Two, what you're charged with is that on or about June 10th, 1988, here in Maryland, you assaulted United States Marshals during the course of their performance of their official duties. Do you understand that?

A Yes, sir.

Q And that do you understand that in order to be convicted of that offense, the Government would have to prove that on or about that time stated, you, with using a deadly and dangerous weapon, you did willfully and forcibly, knowing what you were doing, somehow assault or resist or intimidate [7] various Deputy United States Marshals who are listed there, and that they were—those people were engaged in their official duties at the time that you assaulted them. Do you understand that?

A Yes, sir.

Q Do you understand that in Count Three you are charged with carrying a firearm during that assault, which is charged in Count Two. Do you understand that?

A Yes, sir.

Q Do you understand that in order to be convicted of that offense, the Government would have to prove that on or about the time stated, in this state here in Maryland, you knowingly used the firearm, knowingly and willfully knowing what you were doing, during the commission of a crime of violence which is chargeable under Federal law. Do you understand that?

A Yes, sir.

Q And specifically, I think it is—I'm corrected or not—the assault which is charged in Count Two. Is that right counsel?

MS. RINGLER: Yes, Your Honor.

THE COURT: Fine. Now, counsel what are the maximum statutory penalties?

MR. CRIBARI: Your Honor, my understanding is that the penalty on the handgun charge is five year mandatory [8] minimum consecutive charge. That there is a minimum maximum as the same penalty. On the assault—

MS. RINGLER: I believe the assault is 10 years, Your Honor. Let me make certain.

MR. CRIBARI: I think the assault is a 10 year charge, but subject to the sentencing guideline provision, Your Honor.

THE COURT: And what's the fines?

MR. CRIBARI: I believe on each its a $250,000 fine with a $50 special penalty fine on each count. And, of course, Mr. Braxton, under the guidelines would be subjected to the possibility of cost of imprisonment and the various penalties, similar penalties which I don't think will be applicable, but nevertheless, would apply.

BY THE COURT:

Q All right. Now, let me go over with you to make sure what you understand what the maximum statutory penalty is. On the assault, it's 10 years imprisonment, a fine of $250,000, a $50 special assessment, plus under the sentencing guidelines where there are costs of imprisonment and things of that nature. Do you understand that?

A Yes, sir.

Q And on the Count Three, that gun charge, what it is is in five years minimum and consecutive to whatever sentence is imposed on the other, on Count Two, again a $250,000 fine, a [9] $50 special assessment and costs of imprisonment. Do you understand that?

A Yes, sir.

Q Okay. And you understand that special assessment also is both a maximum and a minimum in the sense that you have to be charged, you have to have that $50 special assessment imposed upon you. Do you understand that?

A Yes, sir.

THE COURT: Ms. Ringler, is there any questions you have about that?

MS. RINGLER: No, Your Honor. I checked the statute and the 10 years is for the assault.

THE COURT: Thank you.

BY THE COURT:

Q Now, you also, under the guidelines, under the statute under the guidelines, are subject to what is called supervised release. Do you understand that?

A Yes, sir.

Q And that is, that after whatever period of incarceration you get, you can be sentenced up to—now it is five years on each count? Does anybody know? Or would it be five years total?

MS. RINGLER: Your Honor, as to Count Two, it's a three year term of supervised release, and that's the same as to Count Three. They're both three.

[10] THE COURT: Now, could they be consecutive to one another?

MR. CRIBARI: Your Honor, it's my—

MS. RINGLER: It's my understanding that it would be three years altogether.

MR. CRIBARI: I think that's right, Your Honor.

THE COURT: I think that's right, too.

MR. CRIBARI: And please understand that when Mr. Braxton and I have discussed the concept of supervised release, or any supervision, after he's through with the Federal sentence, he would go back to St. Elizabeth's. So we've also discussed it in terms of his supervision would encompass his being at St. Elizabeth's.

BY THE COURT:

Q Do you understand that, Mr. Braxton? Presumably, that's where you'll be. But—

A Yes, sir.

Q —conceptually, at least, and I've got to go over this with you, that after any period of incarceration on these charges, you would be subject to a three-year period of supervised release. Do you understand that?

A Yes, sir.

Q And the way that would work is, I mean, if you for some reason were not on—if you violated—you have to be on good behavior for those three years, essentially, and if you [11] did something to violate your conditions of release, I could sentence you back to another three years, the maximum—whatever I imposed on you for supervised release up to that three years without giving you credit for the time that you'd behaved yourself on supervised release. Do you understand that?

A Yes, sir.

Q And that if—under the guidelines, I would have to do that to, basically, revoke your supervised release in the event that you committed a new crime. Do you understand that?

A Yes, sir.

Q Okay. Now, by pleading guilty, you're giving up certain rights and I want to make sure you understand what those rights are. You understand that you have a right to a trial by jury?

A Yes, sir.

Q And you understand that you'd also have the right to be tried by a district judge if you wanted to waive your right to a trial by jury and the Government was willing to waive its right to a trial by jury. Do you understand that?

A Yes, sir.

Q Do you understand that in any trial you would be presumed innocent and the burden would be on the Government to prove your guilt beyond a reasonable doubt. Do you [12] understand that?

A Yes, sir.

Q And do you understand that in any trial you'd have the right to be represented by a lawyer?

A Yes, sir.

Q And do you understand that if you can not afford a lawyer, one would be appointed to represent you at the Government's expense?

A Yes, sir.

Q Do you understand that in any trial, you'd have the right to cross examine everybody who testified against; that is, to ask questions of them?

A Yes, sir.

Q Do you understand that you'd have the right to compel people to come in and testify on your behalf by having subpoenas issued for them?

A Yes, sir.

Q Do you understand that in any trial, if you wanted to, you could take the stand and testify in your own defense? That you could testify if you wanted to, do you understand that?

A Yes, sir.

Q And do you understand that, on the other hand, nobody could force you to take the stand. Do you understand that?

A Yes, sir.

[13] Q And do you understand that if you decided not to take the stand, nobody could draw what the law calls to be an adverse inference from the fact that you decided not to testify; that is, nobody could find that—excuse me, that you were a bad person, or specifically that you didn't—that you didn't—that you did commit the offenses you were charged with because you decided not to testify. Do you understand that?

A Yes, sir.

Q And you understand that if you chose to be tried by a jury, in order to be convicted, their verdict would have to be unanimous; that is, that each and every one of them would have to agree. Do you understand that?

A Yes, sir.

Q And you understand that by pleading guilty, you're giving up each and every one of those rights?

A Yes, sir.

Q And there's been mention of the fact of St. Elizabeth's. Do you understand also about pleading guilty, you're giving up any right to challenge that you were mentally incompetent at the time you committed the offense. Do you understand that?

A Yes, sir.

MR. CRIBARI: Your Honor, please let me add to the record that I've explained to Mr. Braxton that while he would [14] give up any kind of insanity defense to the trial, we certainly think that might bear on the appropriate sentence to be given. So the issue of his mental state and insanity might may well be a sentencing argument. It's not completely divorced from this case, but it is not a defense to what happened.

THE COURT: That's correct.

BY THE COURT:

Q Do you understand that, Mr. Braxton?

A Yes.

Q That it may, you know—it's certainly something Mr. Cribari can say at sentencing. It would be up to me to take that into account as I see fit. It's entirely up to me. But in terms of—but you're waiving the right in terms of the offense itself to claim, basically, insanity as a defense of the crime. Do you understand that?

A Yes, sir.

Q Now, I also need to satisfied that you're entering this plea voluntarily. Now, has anybody used any forced against you to get you to enter the plea?

A No, sir.

Q All right. Has anybody used or made any threats against you to get you to enter the plea?

A No, sir.

Q Has anybody made any kind of promise or inducement or [15] anything else of any kind to get you to enter the plea?

A No, sir.

Q Are you aware of anything that anybody said on behalf of the Government, Mr. Cribari, anybody, because

I understand there's no plea agreement, to induce you to enter this plea? Any kind of promises or representations made at all?

A No, sir.

MR. CRIBARI: Your Honor, I guess I should put on the record that, obviously, since we're only pleading to two counts, we did discuss the possibility that at sentencing the Government may well be induced to drop the remaining count.

THE COURT: Well, I was going to ask that. I take it there's no formal agreement to that effect?

MS. RINGLER: There's no formal agreement, Your Honor. I have told Mr. Cribari that at the time of sentencing, the Government will re-evaluate, and if appropriate, dismiss Count One, following sentencing.

THE COURT: So I understand, Braxton—Mr. Braxton, the Government is reserving its right to decide what to want to do, but if, in fact, there have been discussions and as far as they go, it's basically, the Government, at the time of sentencing, I guess, frankly, if it comes down to the fact that you're satisfied with whatever sentence I impose, then you may evaluate and move to dismiss the indictment?

MS. RINGLER: That's correct, Your Honor.

[16] THE COURT: Of Count One, excuse me.

MS. RINGLER: We reserve the right to do that.

THE COURT: And reverse the right to do that.

BY THE COURT:

Q Do you understand that's the situation, Mr. Braxton?

A Yes, sir.

Q Okay. But it's up to them, but, Mr. Cribari, I am glad you mentioned that. I was going to raise that myself. And you understand that if the Government does move to dismiss that Count One, it will be entirely up to me whether to grant that motion. Do you understand that?

A Yes, sir.

Q Now, as I'm sure Mr. Cribari has gone over with you, this case is subject to what are called the sentencing guidelines. Do you understand that?

A Yes, sir.

Q Now, let me just go over with you in broad outline what these are all about to make sure you understand them. And counsel, if there's anytihng you think I ought to add, go ahead and tell me.

Now, Mr. Braxton, you understand that the way these —what these guidelines are is that they are so-called sentencing guidelines, and they're put out by an outfit, by an organization, called the United States Sentencing Commission. Do you understand that?

[17] A Yes, sir.

Q And what guideline is applicable to a specific case depends upon the nature of the case, the nature of your involvement in the case, the nature of the offense, your criminal history, if any; a variety of factors determine what guidelines should apply. Do you understand that?

A Yes, sir.

Q And you understand that I make certain findings to determine what guidelines apply, but after I've made those findings, I have to sentence you within those guidelines unless I find a specific reason to depart from the guidelines. Do you understand that much before I get too complicated?

A Yes, sir.

Q And do you understand that in order to depart, I'd have to find—that is, to go under the guidelines or over the guidelines—I'd have to find some reason, and state it, that I believe should apply in your case that the sentencing commission had not properly considered. Do you understand that?

A Right. Yes, sir.

Q And you understand that if I sentence under the guidelines, you could appeal my sentence—excuse me. If I sentence under the guidelines—I guess you could, but I doubt if you'd want to—a sentence under the guidelines,

[18] the Government could appeal. Now, if I sentenced over the guidelines, you could appeal. Do you understand that?

A Yes, sir.

Q And also, I think, I should add that you could also —the law is not entirely clear on this, but in terms of— if I make findings which cause a particular guideline to be imposed and you think I made a mistake in that in some respect, you could appeal that, too. Do you understand that? If I made some finding as to what guide— which makes one guideline applicable, and you think I'm wrong about that, you could appeal that, as well. Do you understand that?

A Yes, sir.

Q And the Government, presumably, could do the same thing. Do you understand that? That if the Government disagreed with some finding that I made and said I applied the wrong guideline, they could appeal my finding. Do you understand that?

MR. CRIBARI: Your Honor, let me explain on the record the way I explained this to Mr. Braxton. What I told him was that his sentence—and we're really, I suppose, only talking about the sentence on the assault count because the other is a mandatory maximum minimum statutory—his sentence would be determined by Your Honor after the Pre-Sentence Investigation Report from Mr. Feldman—and that under the Federal Sentencing Law, you would consider on one [19] hand Mr. Braxton and his background, and on the other hand the nature of the offense, and that the law provided for an area where those two considerations met. And that once you determined where that area was, you had to sentence within that area. If you didn't, and we felt that what you did was sentence him illegally under the guidelines, we could appeal that. And that if the Government thinks you sentenced illegally under the guidelines, the Government could appeal that. And that, while he gives up his right

to appeal from the sentence if we determine, or if we think, the sentence might be illegal. I have not gone into greater detail about the way the guidelines work because I didn't think that it was fruitful to do that.

THE COURT: I think that's a fair statement.

BY THE COURT:

Q Mr. Braxton, do you understand that? Is that what Mr. Cribari told you?

A Yes, sir.

Q And you understand what he's told you? And you understand that?

A Yes, sir.

Q All right. I think, basically, that's right. When it all comes down, if you think I've made a mistake in applying or determining these factors, then you can appeal my [20] sentence. Do you understand that?

A Yes, sir.

Q Or the Government can appeal the sentence if they think I've made a mistake. Do you understand that?

A Yes, sir.

THE COURT: I need to be satisfied, also, that there's a factual basis for your entry of the plea of these two counts. And Ms. Ringler, I'd ask you to state the facts that the Government would be prepared to prove if the case went to trial.

MS. RINGLER: Thank you, Your Honor. The Government would prove that on September 16th, 1974, Mr. Braxton was confined to St. Elizabeth's Hospital in Washington, D.C. pursuant to a U.S. District Court order that he was found not guilty by reason of insanity on a charge of bank robbery in that district. In connection with that offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

On or about May 12, 1988, the U.S. Marshal Service for the District of Columbia received an arrest warrant charging Mr. Braxton with unauthorized leave from St. Elizabeth's Hospital.

The evidence would show that on June 9th, 1988, Deputies Jenkins and Williamson responded to 4301 Eastern Avenue, Apartment 3, in Mt. Rainer, Maryland, and verified [21] that Thomas Braxton was residing at that address.

The following day, on June 10th, 1988, at approximately 7:00 a.m., four Deputy U.S. Marshals named Sherry, Corruthers, Kelly and Jenkins went to Mr. Braxton's address at 4301 Eastern Avenue and confirmed that Mr. Braxton resided at Apartment Number 3. At approximately 7:00 a.m., Deputy Jenkins knocked on Apartment 3 and received no response; however, he could hear movement coming from inside the apartment. Deputy Jenkins again knocked, identified himself as a United States Marshal, and advised Mr. Braxton that he had a warrant for his arrest. Again, there was no response from Mr. Braxton. At approximately 7:30 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff at the apartment building. Deputy Jenkins again knocked, identified himself as a United States Marshal, and announced his purpose in being there. Deputy Jenkins, who was standing directly in front of the apartment door, opened the door and found that there was a security chain locking it, and so he could only crack it open. At that point, Deputy Jenkins kicked the door open, and contemporaneous with the door opening, a gunshot was fired through the door opening. The gunshot lodged in the front door just above the doorknob. That's the outside of the front door. The four Deputy U.S. Marshals were all located either in front of or next to the front door which [22] had been opened and through which the gunshot had been fired. After several moments, Deputy Jenkins again announced himself, and kicked the door open. The door had snapped shut between the first two attempts to open it. When he kicked it open a second time, a second gunshot was fired again through the door opening. The second bullet lodged approximately five feet high in the door; that's

from the floor up to the ceiling. And it was located in the middle of the door about where Deputy Jenkins had been standing.

The U.S. Marshals then withdrew to a cover position. After firing the shot, the Defendant stated that he was not coming out, that he did not want to go back, and that if the U.S. Marshals came inside, he would kill them or blow their head off. Additional U.S. Marshal units were requested and P.G. County Police were called. The area was barricaded and secured with the evacuation of nearby buildings, and the Prince Georges County Emergency Response and Crisis Intervention Team took over. When the Intervention Team arrived, Mr. Braxton was again asked to leave the apartment to which he yelled that he was not coming out. He stated to the Crisis Team that, "I want you to come in and get me. I want to kill you." At least two additional shots were fired after the arrival of the Crisis Intervention Team. The Government would not be producing any evidence that those shots were filed at anyone.

[23] At approximately noon, Mr. Braxton was forcibly removed from his apartment with tear gas. Seized from him was Smith and Wesson 38 caliber six-shot revolver with a two-inch barrel containing four expended 38 caliber shells. Two shell casings were actually found in the apartment. A forensic expert analyzed the bullets lodged in the door and found that they were consistent with the gun seized from Mr. Braxton.

After being advised of his Maranda rights, Mr. Braxton stated that he knew United States Marshals were knocking on his door, and he fired at them because he did not want to return to St. Elizabeth's Hospital. And that would be the substance of the Government's case.

MR. CRIBARI: Can I have a moment, Your Honor, please?

THE COURT: Yes.

(Discussion off the record.)

MR. CRIBARI: Your Honor, we would agree that Ms. Ringler's statement of facts is accurate; however, Mr. Braxton's best recollection is that the two bullets that hit the door were fired at the same time, not at different times. I'm not sure that matters for purposes of the plea, but that's his recollection.

THE COURT: But that's his recollection.

MR. CRIBARI: And I believe that when Ms. Ringler [24] says that a Smith and Wesson was recovered from Mr. Braxton, in fact, it was recovered in the apartment after he had come out of the apartment and had been taken into custody. I don't think he walked out with the gun.

THE COURT: Do you know that, Ms. Ringler?

MS. RINGLER: Your Honor, it was recovered from the apartment. I would add to the Government's statement the fact that Mr. Braxton was the only person in the apartment at the time that he was actually arrested. So it was found on the floor in the apartment near the shell casings which were also recovered.

THE COURT: Now, Mr. Braxton, if you would stand. With those modifications stated by Mr. Cribari and Ms. Ringler, did what the Government say that it could prove happened, is that what happened?

THE WITNESS: Yes, sir.

THE COURT: And you admit that you did what the Government says it could prove you could do?

THE WITNESS: Yes, sir.

THE COURT: Well, I find that there is a factual basis for you to enter the plea. I find that you are entering the plea voluntarily, completely voluntarily, knowing, essentially, that there is no plea agreement. There was a discussion about the dismissal of Count One which we went over before. But there is no plea agreement, and you [25] understand that. I understand that you understand the rights that you're giving up by pleading guilty, and that you're voluntarily doing that. You understand the charge against you and the penalties to

which you are subject. I also find that you are competent to enter your plea. Perhaps we ought to have some statement on the record, Mr. Cribari, as to was there any competency determination? I think we should go over that.

MR. CRIBARI: Your Honor, I first met Mr. Braxton on August 19th of last year at the arraignment on this case. At that time, it became evident to me that he was living at St. Elizabeth's, and it became evident to me, essentially, what the case was about. Subsequent to that, I had Dr. Neal Blumberg evaluate Mr. Braxton for both competency and a possible insanity defense. In connection with that, Dr. Blumberg talked to Mr. Braxton on several occasions, talked to me, talked to the public defender lawyer who serves at St. Elizabeth's who has represented Mr. Braxton in the past, and reviewed all of Mr. Braxton's medical records which I obtained from St. Elizabeth's and which are in three volumes approximately two and a half inches thick. I will provide all those documents to Mr. Feldman as part—and the Government—as part of the Pre-Sentence Investigation Report. Based on Dr. Blumberg's analysis, and based upon my own researches and my own discussions with Mr. Braxton, there [26] is no competency problem, especially since he takes the medicine and he's been living at St. Elizabeth's, and that there was no possible insanity defense that could be meritoriously be put forward under the new law. I have no illusions that if we were under the old law we may well have one. But under the new law, I don't think we have an insanity defense, and frankly, could not find a doctor who would put it on.

And I am satisfied in my own dealings, and also in Dr. Blumberg's report, that Mr. Braxton is competent. I've never had any trouble with him understanding what's going on. I know he has written the Court on some occasions. And while Mr. Braxton's abilities as a letter writer may not be the most brilliant in history, he certainly can communicate. He's communicated with

me in writing, over the telephone, and in person, and I have not had any difficulties dealing with him.

THE COURT: And while you're on your feet, just let me ask, I noticed and I had forgotten, that there had been a motion to suppress statements from that—

MR. CRIBARI: I'll withdraw any motions that we filed in this case, Your Honor.

THE COURT: And you've been over those with Mr. Braxton? He understands that by pleading guilty he's giving up any right to pursue the matters set forth in the motion?

[27] MR. CRIBARI: Yes, Your Honor. He knows the only possible appellate relief from here will be on an illegal sentence.

THE COURT: You understand that, Mr. Braxton? By pleading guilty, you're giving up any motions to suppress, or anything of that nature. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: Well, I just said before that I made a finding of competency. I didn't mean that. I had heard informally of Dr. Blumberg's report. I now make a finding, and knowing that and having observed that, I tentatively made the finding. I now make that finding based upon the representations of Mr. Cribari. Based upon what was said and my own observation of you, it's clear to me that you fully understand what's going on and the effect of everything going on today, that I do find that you are fully competent to enter the plea. So, I also make that finding.

Now, before I decide whether or not to accept the plea, counsel, do either of you know of anything else I should take up with Mr. Braxton?

MR. CRIBARI: Your Honor, the only thing I would add is something Ms. Ringler and I have discussed in the past, and that's the determination of the guideline that will be appropriate. I, frankly, don't think we need go into great detail. I have explained to Mr. Braxton

what I've told [28] you, that Your Honor can sentence Mr. Braxton up to 10 years in jail on that offense. That it's up to Your Honor to determine the sentence, but that to a large extent, the sentence will be governed by the guideline.

Mr. Braxton and I, and also, myself with Ms. Murdock and Mr. Segretti from my office—we've had several meetings—had lengthy discussions at which we concluded what a jury might and might not do, and what the sentencing judge might and might not do. Of course, there is lurking in the background the allegation of an attempted murder. You can gather from Mr. Braxton's position, and probably from Ms. Ringler's statement of facts, that Mr. Braxton admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone.

Nevertheless, we've explained to Mr. Braxton that you're going to consider all of these facts in determining a sentence, both considering them under the guideline to determine the guideline, and considering them for any departures under the guideline. That you could depart upward if you think he tried to murder the marshals. You could conceivably depart downward if you thought he didn't know what he was doing, or that there was a reason to do that. But that, it's sort of open season on sentencing, as it were, although within the procedures outlined by the guidelines.

I state that so that Mr. Braxton can hear me state [29] that, so that the Court can hear me state that, and I think so that Ms. Ringler can hear me state that.

THE COURT: All right. Anything further to add?

MS. RINGLER: No, I'm satisfied with that, Your Honor.

THE COURT: Well, that's fine. Mr. Braxton, that's basically right in terms of sentencing in this case. It's now going to be within the framework, and I certainly fully intend to comply with the guidelines and what I understand to be their nature and effect. Within their

framework, it's going to be up to me. Do you understand that?

THE WITNESS: Yes, sir.

MR. CRIBARI: Mr. Braxton—

THE COURT: And then, I would hope what I'm going to get from counsel on each side is memoranda delineating—short memoranda. I don't want—you don't have to write me a thesis, but a short memorandum before sentencing basically outlining your basic position.

MR. CRIBARI: Your Honor, we will do that. Now, Mr. Braxton has on numerous occasions told me he wants to make a statement to the Court, and I've advised him that that's appropriate at sentencing. So I tell Your Honor that at sentencing Mr. Braxton will, indeed, make his statement as to what he did, and why he did it, and so on. But that right now, since you're not determining sentence, it would be a [30] little early for us to make such statements. He does have an explanation that he wants Your Honor to hear.

THE COURT: I'd be glad to hear it from you, Mr. Braxton. I look forward to hearing from you at the time of sentencing. Of course, you won't have to say anything now, but I'd be glad to hear and fully consider whatever you have to say at that time. But Mr. Cribari is right. It would be at the time of sentencing rather than now would be the time for me to hear from you.

THE WITNESS: Could I say something right now, Your Honor?

THE COURT: Well, I guess you have a right to.

THE WITNESS: I want to take that plea back. I want to take that plea back. I want to move my mouth. I want Mr. Cribari to talk for me.

THE COURT: I'm sorry?

MR. CRIBARI: May I have a moment, Your Honor, please?

THE WITNESS: I want Mr. Cribari to talk for me.

THE COURT: Oh, at sentencing?

THE WITNESS: Yeah.

THE COURT: Well, that would be fine. You won't have to say a thing at sentencing. It will be entirely up to you. As I say, I'll be glad to hear from you if you want to. I'll be glad to hear from Mr. Cribari on your behalf, and I [31] certainly am not going to hold it against you that you don't say anything. Do you understand that?

MR. CRIBARI: Okay?

THE WITNESS: (No response.)

THE COURT: Fine.

MR. CRIBARI: Thank you, Your Honor.

THE COURT: Now, I guess we ought to set a sentencing date. Now, I would think that in this case there's no real reason for the probation office to get involved in any kind of factual finding or things of that nature. You may address—I assume that counsel from both sides may be addressing their views of the facts in the memoranda, and I'll be glad to hear from you, but I don't think we have burden the probation office with any findings on that, do you Mr. Cribari?

MR. CRIBARI: I do not, Your Honor.

THE COURT: So why don't we use what are now called I think, "Type A Scheduling Orders" which means that the report can be prepared, I think, within 30 days.

MR. CRIBARI: Your Honor, I'm going to be a bit of a—excuse me, a bit of a pain here at the moment. From June 16th until June 30th, I will be on vacation out of the country. Now, I would be happy to do the sentencing prior to June 16th, or immediately in the first week of April (sic) after whatever the court holiday is.

[32] THE COURT: You mean July?

MR. CRIBARI: I'm sorry. Yes, July. The first week of July after the Independence Day Holiday, but I would not be available the last two weeks in June.

THE COURT: Well, that's fine. Under the 30 day schedule, it's really 30 days for the preparation of the report, and then, time triggers after that. So we wouldn't be doing much before—Ms. Turner, what do we actually

set? With a 30 day report, what are we looking for as a final date? About how much from now?

MS. TURNER: It's 30 days from when the report is in, it's 14, then 11, then five.

THE COURT: So what's that add up to?

MS. RINGLER: You're in the middle of July, I think, Your Honor.

THE COURT: Fourteen, eleven, five and thirty? Do we all come up with 60?

MS. RINGLER: Yes.

THE COURT: 60 days.

MR. CRIBARI: Your Honor, can I suggest the afternoon of Thursday, July 20th, unless that's too early, or earlier than that. I tend to think the earlier the better.

THE COURT: Oh, I agree. And if you all want to waive some of those time filings, we can make it earlier than that, if you want. I mean, a lot of this time has to be [33] built in to respond to the report.

MR. CRIBARI: Your Honor, I will—as long as I'm not in the position of having to respond between June 16th and June 30th, I'll respond the day I get the report from Mr. Feldman. I don't need two weeks to respond. I know—

THE COURT: Well, rather than enter one of those—and you'd be willing to waive any rights that you may have under the guidelines, or whatever, for response times?

MR. CRIBARI: Oh, sure.

THE COURT: Okay. Well, rather than enter an order, why don't we set a sentencing date, say, during the week of July 10th of some kind.

MR. CRIBARI: That's fine, Your Honor.

THE COURT: Now, if at some point an issue comes up that you all think needs to be responded to in the report—

MS. RINGLER: We can just advise the Court.

THE COURT: —advise me and we'll reset it.

MR. CRIBARI: That's fine, Your Honor.

MS. RINGLER: That's fine.

THE COURT: Why don't we try to set it at—

MR. CRIBARI: I think the afternoon is better for the marshals since they have to go to St. Elizabeth's.

THE COURT: Four o'clock on, how about July 10th?

MS. RINGLER: That sounds fine, Your Honor.

MR. CRIBARI: Which day, Your Honor?

[34] THE COURT: July 10th; is that all right, Mr. Marshal?

THE MARSHAL: That's fine, Your Honor.

MR. CRIBARI: That's fine, Your Honor. And if there's any reason to change that, I'm sure we'll let you know ahead of time.

THE COURT: Sure. Okay. I'm not sure I ever accepted the plea. I accept your plea of guilty to Counts Two and Three, Mr. Braxton.

THE WITNESS: Thank you, Your Honor.

MR. CRIBARI: Your Honor, I think you accepted the plea at exactly 4:38. Thank you, Your Honor.

THE COURT: All right. Okay. Sentencing—wait a second. I just want to write this down. All right. Thank you all very much. I'll stand in recess.

THE CLERK: Please rise. This Honorable Court now stands in recess.

(Proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

PRESENTENCE REPORT

Prepared For:	The Honorable J. Frederick Motz United States District Judge
Prepared By:	Richard L. Feldman, L.C.S.W. Senior U.S. Probation Officer (301) 962-4964
Sentencing Date:	July 10, 1989
Offense:	Assault on a Federal Officer in violation of 18:USC:111 (Count Two) and Use of a Firearm During A Crime of Violence in violation of 18:USC:924(c).
Release Status:	Arrested on June 9, 1988 and given an initial appearance before the Honorable Paul M. Rosenberg, U.S. Magistrate on August 19, 1988. The defendant was ordered detained.
Identifying Data:	
Date of Birth:	July 1, 1949
Social Security No.:	577-64-9404
Address:	St. Elizabeth's Hospital Howard Pavilion 2700 Martin Luther King, Jr. Avenue, S.E. Washington, D.C. 20032
Detainers:	Court ordered mental health commitment.
Associate Defendants:	None.
Assistant U.S. Attorney Susan R. Ringler Assistant U.S. Attorney U.S. Courthouse 8th Floor 101 W. Lombard Street Baltimore, MD 21201 301/962-4822	*Defense Counsel* Steven Cribari, Esquire Deputy Federal Public Defender 612 Mercantile Bank & Trust Bldg. 2 Hopkins Plaza Baltimore, MD 21202 301/962-3962
Date Report Prepared:	
Revised:	
Disposition:	

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On May 22, 1989, the defendant appeared with appointed counsel before the Honorable J. Frederick Motz, in the U.S. District Court for the District of Maryland and entered pleas of guilty to Assault on a Federal Officer (Count Two) in violation of 18:USC:111 and Use of a Firearm During a Crime of Violence in violation of 18:USC:924(c). Another count (Count One), charging the defendant with Attempted Murder remains outstanding. There is no plea agreement in this case. The defendant was ordered to remain in custody and a presentence investigation was ordered pending sentencing on July 10, 1989.

2. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

3. None.

The Offense Conduct

4. The following Statement of Facts was supplied by the Assistant U.S. Attorney in this matter:

5. "On or about September 16, 1974, the defendant, Thomas Braxton, was confined at St. Elizabeth's Hospital, John Howard Pavilion, in Washington, D.C., pursuant to a U.S. District Court Order after he was found not guilty by reason of insanity on a charge of bank robbery in violation of 18 U.S.C. Section 2113(a). In connection with this offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

6. "On or about May 12, 1988, the U.S. Marshal's Service for the District of Columbia received an arrest

warrant charging Thomas L. Braxton with unauthorized leave from St. Elizabeth's Hospital.

7. "On June 9, 1988, Deputies Jenkins and Williamson responded to 4301 Eastern Avenue, Apt. 3. Mt. Rainier, Maryland, and verified that Thomas Braxton was living at that address. The following day on June 10, 1988 at approximately 7:00 a.m., Deputy U.S. Marshals Shealey, Carruthers, Kelley and Jenkins responded to 4301 Eastern Avenue. At that time, it was confirmed that Thomas Braxton was in Apt. 3. Deputy Jenkins knocked again, identified himself as a U.S. Marshal, and advised the defendant that he had a warrant for his arrest. Movement could be heard inside the apartment but there was no response.

8. "At approximately 7:35 a.m., Deputy Jenkins unlocked the door with keys that had been provided to him by the maintenance staff. Deputy Jenkins again knocked, identified himself and announced his purpose. Deputy Jenkins, who was standing directly in front of the door, opened the door as far as the chain locking device would allow, and then kicked it open. Coinciding with the door's opening, a gunshot was fired through the door opening which lodged in the door just above the door knob. The shot was fired in the direction of four U.S. Marshals who were located in front of and next to the front door and were visible through the door opening. After the first shot was fired, the door snapped back. Several moments later, Deputy Jenkins again announced himself and kicked open the door. A second gunshot was fired again through the door opening and a bullet hole was observed in the mid-portion of the outside of the door at the level of Deputy Jenkins' chest and head. After firing the shots, the defendant stated that he was not coming out—he did not want to go back and if the U.S. Marshals came inside, he

would kill them/blow their heads off. The U.S. Marshals withdrew to a cover position and secured the area. Additional U.S. Marshal units were requested as well as uniformed support from Prince Georges County.

9. "The area was barricaded and secured with the evacuation of nearby buildings. The Prince Georges County Emergency Response & Crisis Intervention Team took over. When the Crisis Intervention Team arrived, the defendant was asked to leave the apartment, to which he yelled that he was not coming out. He stated: "I want you to come in and get me. I want to kill you." At least two additional shots were fired after the arrival of the Crisis Intervention Team.

10. "At approximately noon, the defendant was forcibly removed from the apartment with tear gas and he resisted arrest. The defendant had been alone in the apartment. Seized from the living room floor of Mr. Braxton's apartment was a Smith & Wesson .38 cal. 6 shot revolver with a 2-inch barrel containing four expended .38 cal. shells. Two expended shell casings were found on the living room floor. The two bullets lodged in the front door were consistent with the .38 cal. gun seized from the defendant's apartment.

11. "After being advised of his *Miranda* rights, Mr. Braxton stated that he knew U.S. Marshals were knocking on his door, and he fired at them because he did not want to return to St. Elizabeth's Hospital."

12. Contact with the victims in this matter was attempted. Unfortunately, only one victim, Deputy U.S. Marshal Mark Shealey responded. Mr. Shealey indicated that no injury occurred.

13. Restitution does not appear to be an issue in this case.

14. The defendant, upon advice of counsel, refused to discuss the instant offense.

Adjustment for Obstruction of Justice

15. This officer does not have any information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

16. Though the defendant pled guilty in this offense, no statements were made indicating that the defendant accepted responsibility.

Offense Level Computation

17. Base Offense Level: The guidelines for 18:USC:111 are found in Section 2A2.2. Section 2A2.2 provides that the base offense level for this offense is 15.

18. Since there is no plea agreement as to the stipulation in this matter, the Government has indicated that the Court should apply a higher base offense level for the more serious offense of Attempted Murder pursuant to Sentencing Guidelines Section 1B1.2. During the plea of guilty in this matter, the defendant did not disagree with the Statement of Facts read in open Court by the Government. The facts of this case appear to substantiate that the defendant attempted to kill the U.S. Marshals in the performance of their duty. It is believed, that Mr. Braxton should be sentenced under the appropriate guidelines relevant to the more serious offense of Attempted Murder. The base offense level for Attempted Murder of a U.S. Marshal, 18:USC:1114, is 20 as found in Section 2A2.1. 20

19. Specific Offense Characteristics: None. 0

20. Adjustment for Role in the Offense: None. 0

21. Victim Related Adjustment: The victims in this matter were federal officials and therefore an adjustment of three points needs to be added pursuant to Section 3A1.2. 3

22. Adjustment for Obstruction of Justice: None. 0

23. Adjusted Offense Level (Subtotal): 23

24. Adjustment for Acceptance of Responsibility: The defendant made no statements indicating that he accepted responsibility for this offense. 0

25. *Total Offense Level* 23

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudications

26. None.

Criminal Convictions

27. Maryland Rule 719 or Rule 4-213 entitles all defendants to notice of the right to be represented by counsel and to have counsel appointed if indigent for all felony charges since September 1, 1967 and for all lessor offenses since July 1, 1977.

	DATE OF ARREST	*CHARGE/DISPOSITION/ GUIDELINE*	*SCORE*
28.	11/10/78 (age 29)	Superior Court of Washington, D.C. Possession of Prohibited Weapon and Reckless Driving. Defendant sentenced to two years probation, to run concurrent, on each charge. Defendant stated he was represented by a Public Defender.	1

29.	7/4/87 (age 38)	Superior Court of Washington, D.C. Theft (reduced to Shoplifting), 30 days confinement. Defendant indicated that he was represented by counsel.	1

Criminal History Computation

30. The criminal convictions result in a subtotal criminal history score of 2. 2

31. The total of the criminal history points is 2. According to the sentencing table (Chapter 5, Part A) 2 or more criminal history points establish a criminal history of Category II.

Other Criminal Conduct

32. Mr. Braxton was arrested for possession of narcotics on January 30, 1971 in Washington, D.C. and given a sentence of 90 days incarceration on March 22, 1971. Furthermore, Mr. Braxton was arrested on January 11, 1973 and charged with Carrying a Deadly Weapon in violation of the Bail Reform Act, both of which occurred in Washington, D.C. On the carrying a deadly weapon charge, Mr. Braxton received 1-4 years confinement, suspended, 100 days incarceration with five years probation. Also, he received a sentence of 6-18 months on the Bail Reform Act, suspended, with two years probation, concurrent. Since the previous convictions were at least fifteen years before the commission of this offense, no points were added. Finally, it is noted that the defendant was found not guilty by reason of insanity on a charge of Bank Robbery which occurred in 1973 and he was subsequently committed to St. Elizabeth's Hospital for mental health treatment due to a psychiatric problem (see Mental and Emotional section).

Pending Charges

33. None.

PART C. SENTENCING OPTIONS

Custody

34. Statutory Provisions: The maximum term of imprisonment for Assault on a Federal Officer is 10 years imprisonment. 18:USC:111.

35. Statutory Provisions: The maximum term of imprisonment for Use of a Firearm during a Crime of Violence is five years, consecutive to any other sentence. It appears that this is a mandatory five years. 18:USC:924(c).

36. Guideline Provisions: Based on the total offense level of 23 and a criminal history category of II, guideline and imprisonment range is 51-63 months as to count 2.

Supervised Release

37. Statutory Provisions: If a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years for both offenses pursuant to 18:USC:3583(b)(2).

38. Guideline Provisions: The Court should order a two to three year term of supervised release to follow if a sentence of imprisonment of more than one year is imposed. 5D3.1(a) and 5D3.2(b)(2).

Probation

39. Statutory Provisions: For a felony, not less than one year nor more than five years, as to each count, pursuant to 18:USC:3561(b)(1).

40. Guideline Provisions: Since the lower end of the guideline range applicable in this case is 51 months, the defendant is ineligible for probation. Section 5B1.1 and 5C2.1(f).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities, and Community Ties

41. Defendant Thomas Braxton was born on July 1, 1949 in Washington, D.C. to the union of Audrey Braxton and Thomas T. Braxton. As the third of four children, Mr. Braxton claims to have enjoyed an average childhood. Both parents were employed and the defendant indicates that he did not lack for emotional nor financial care. There is no evidence that the defendant suffered from any emotional trauma while growing up and he claims to have matriculated from high school at the appropriate age. After graduating from high school he at first obtained employment but later attended Winston Salem State College, according to him, on a football scholarship. After approximately a year, he entered the army and was Honorably Discharged around 1971.

42. The defendant's mother was interviewed during the course of this investigation. Mrs. Braxton verified the above information yet offered little insight into the personality of her son. She did indicate that her son has had a long history of mental illness and that the instant offense occurred because of his failure to report to St. Elizabeth's Hospital. She reflected support for him in his current predicament and hoped that he would not be sentenced harshly.

43. The defendant claimed that he was married in 1968 to Sherry Lanier yet no children resulted from this relationship. He denies paternity of any other children. It is noted, however, that the defendant's mother stated that he has never been married and there is no indication of any marital history in the voluminous information released from St. Elizabeth's Hospital.

Mental and Emotional Health

44. Reports from St. Elizabeth's Hospital and a psychiatric evaluation performed by Dr. Neil Blumberg, M.D. were reviewed. According to these reports, the defendant first received psychiatric treatment at the age of 12 in 1961 when he was charged with Theft and committed to St. Elizabeth's Hospital. He has said to have additionally received psychiatric treatment in 1967 while treated at Howard University Hospital for headaches. Psychiatric treatment was also received by the defendant while he served in the U.S. Army. Mr. Braxton indicated that this treatment was a direct result of excessive drug abuse.

45. Mr. Braxton was arrested for Bank Robbery in 1972 and later found not guilty by reason of insanity on September 16, 1974. The sentencing Court, the Superior Court for Washington, D.C., committed the defendant to St. Elizabeth's Hospital because of his mental condition. The defendant was originally diagnosed as suffering from schizophrenia, chronic undifferentiated type. Since that time the defendant has remained a patient of St. Elizabeth's Hospital although he has been released at various intervals on conditional release status. While on conditional release Mr. Braxton was obligated to report for therapy to the outpatient department (OPD) and receive psychotherapy as well as medication. It is noted that the defendant applied for release from his conditional release status yet this was denied at one point. While on conditional release Mr. Braxton failed to report for outpatient treatment and the Court was requested to issue a warrant for Mr. Braxton's arrest due to his failure to report to the outpatient department. In this regard the U.S. Marshal's attempted to serve a warrant and the instant offense occurred.

46. Mr. Braxton is currently residing in Ward 12 at the Howard Pavilion within the complex of St. Elizabeth's Hospital. His diagnosis of schizophrenia remains current and he is receiving Thorazine daily. Contact with Mr. Walter Taylor, Ward Administrator, reflects that Mr. Braxton is participating fully in ward activities and has been cooperative since his arrest in this matter. Mr. Taylor indicated that the defendant has been unrealistic as to his future plans considering his arrest in this matter and has also evidenced some fantasy thinking with regards to employment possibilities. However, he noted that Mr. Braxton has been active as a recreational counselor and a ward representative of other patients.

47. In interviewing the defendant it appeared that he evidenced some delusional thinking by noting that he had a long-standing employment history as an undercover officer for various federal agencies. Furthermore, he stated that he served in Vietnam and had also received a degree in criminal psychology while residing as a patient at St. Elizabeth's Hospital. None of the previous appears to be accurate. It is further noted that Dr. Blumberg, in his second interview conducted in October, 1988, noted that the defendant exhibited other examples of delusional thinking including that he was a professional athlete involved in the Olympics and had received a doctorate in Criminal Psychology from Federal City College. Mr. Braxton had also indicated to Dr. Blumberg that he had married at the age of 7. Dr. Blumberg's opinion was that the defendant suffered from schizophrenia, undifferentiated type, chronic and that his illness was characterized, at times, by flattened affect and persecutory and grandiose delusions. Dr. Blumberg opined that the defendant committed the instant offense because of his reluctance to return to the hospital and not necessarily because of his delusional thinking.

Physical Condition, Including Drug Dependence and Alcohol Abuse

48. The defendant is 5'11" tall and weighs approximately 175 pounds. Mr. Braxton indicates that he smokes approximately two and one-half packs of cigarettes a day, yet is in perfect physical condition. Though the defendant originally stated that he did not use drugs or alcohol, he later indicated that he has had a cocaine problem for the last 17 years. He has also admitted to snorting heroin.

Educational and Vocational Skills

49. Information found in the defendant's files in St. Elizabeth's Hospital reflects that he graduated from Dunbar High School in 1967 and later attended Winston State College on an athletic scholarship. There is also some indication that the defendant attended Federal City College. However, Mr. Braxton has indicated that he has obtained a diploma from Federal City College now known as the University of the District of Columbia, and also received a related degree while residing as a patient at St. Elizabeth's Hospital.

Employment Record

50. Mr. Braxton has indicated that he has held only two full-time jobs. He worked for the American Red Cross as an attendant between 1982 and 1984 and later, through his veteran status, he was able to obtain a job as a messenger for the Department of the Interior between May, 1985 and August, 1987. He further indicated that this employment permitted personal use of firearms as an undercover law enforcement officer. The previous employment was verified within the outpatient records of St. Elizabeth's Hospital. However, the defendant quit his job at the Department of the Interior for unknown reasons

and has been unemployed ever since. It appears that he used money from a veteran's disability pension to pay necessary bills.

PART E. FINES AND RESTITUTION

51. *Statutory Provisions*: The maximum fine for each of these offenses is $250,000, pursuant to 18:USC:3571(b)(3), totaling $500,000.

52. A special assessment of $50 as to each count is mandatory. 18:USC:3013.

53. There appears to be no need for restitution in this case.

54. Unfortunately, only one of the victims in this matter was able to be contacted and that individual revealed no specific harm requiring additional restitution.

55. *Guideline Provisions*: The fine range for an offense level total of 23 is $10,000 to $100,000 according to 5E4.2(c)(3).

56. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the cost to the Government of any imprisonment, probation or supervised release as ordered, according to 5E4.2(i). The Administrative Office of the U.S. Courts indicates that average monthly cost of incarceration is $1,210.05 while the average monthly cost of probation is $91.66 according to the Advisory dated May 11, 1989.

Defendant's Ability to Pay

57. Mr. Braxton indicates that he receives a veteran's pension of $538 per month. This amount totals approximately $6,456 per year. Should the defendant be incarcerated, it would appear that his income would be sufficient to assist in payment of his confinement.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

Although the defendant may have suffered from schizophrenia, a mental illness, at the time the offense was committed, it is noted that reduced mental capacity may not be considered for departure from the Guidelines. A defendant's reduced mental capacity, as found in the Diminished Capacity (5K2.13) policy statement, reflects that this departure may only be used in consideration of a non-violent offense.

U.S. DEPARTMENT OF JUSTICE
United States Attorney
District of Maryland
Baltimore, Maryland 21201-2692

June 27, 1989

Richard Feldman
United States Probation Officer
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: United States v. Thomas L. Braxton
Criminal No. JFM-88-0252

Dear Richard:

I have reviewed the presentence investigation which you prepared on Thomas Braxton. This is to advise you that the government has no objection to your report. In your report, you referred to psychiatric records which you reviewed relating to Thomas Braxton from St. Elizabeth's Hospital and Dr. Neil Blumberg. Since I have not had an opportunity to review those records, I would appreciate it if you could provide me copies of the documents which you did review in preparation of your report.

I thank you for your assistance. If you should need any additional information, please do not hesitate to contact me.

Very truly yours,

BRECKINRIDGE L. WILLCOX
United States Attorney

By: /s/ Susan M. Ringler
SUSAN M. RINGLER
Assistant United States Attorney

cc: Stephen J. Cribari, Esquire

OFFICE OF THE FEDERAL PUBLIC DEFENDER
DISTRICT OF MARYLAND
Baltimore, Maryland 21201-2991

July 6, 1989

Mr. Richard Feldman
United States Probation Officer
6.100 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Re: United States of America
v. Thomas Braxton
Criminal No: JFM-88-0252

Dear Mr. Feldman:

The purpose of this letter is to memorialize the substance of our telephone conversation yesterday, July 5, 1989.

I object to your presentence investigation report in three areas: your treatment of acceptance of responsibility, victim related adjustments, and your determination of the base offense level, as contained in paragraphs 16, 21 and 18 respectively.

You are familiar with Mr. Braxton's mental history, in no small part because I provided you with extensive documentation and reports concerning that history. You are familiar with the fact that Mr. Braxton had not taken his psychotropic medication for sometime prior to the incident that is the basis of the charges in this case. You are also familiar with the fact that at the time of his apprehension and arrest, following his arrest, and during the most recent court proceeding in this case, Mr. Braxton has acknowledged what happened on the day of his arrest, admitted to those acts, and stated repeatedly, and in different ways, that he did what he did so that

he would not be taken back to St. Elizabeth's Hospital. Mr. Braxton who has freely admitted what he did, is confined to a mental institution because of severe schizophrenia. He is also overtly delusional, I do not understand how he can be denied a two level reduction for acceptance of responsibility. It's not that I did not expect you to find the way you did; but I simply do not understand it. I remind you that under guideline 3E1.1, the defendant is not automatically entitled to a two level reduction for acceptance of responsibility because he pleads guilty, but neither is he automatically to be denied such a reduction solely because he enters a guilty plea. Mr. Braxton clearly has acknowledged what he did. If he were capable of a greater demonstration of acceptance of responsibility, he would not be confined at St. Elizabeth's Hospital for the criminally insane.

Secondly, holding for a moment our discussion of the appropriate base offense level, I think you are wrong to increase the base offense level by three levels, as you do in paragraph 21 under Victim Related Adjustments. It is true, according to guideline 3A1.2, that if the victim of a crime is a law enforcement or corrections officer, the base offense level is increased by three levels. However, application note three to that section states: "Do not apply this adjustment if the offense guidelines specifically incorporates this factor." The statute which Mr. Braxton is charged with violating is 18 U.S.C. § 1114 (protection of officers and employees of the United States). This statute only applies when the victim of the offense is a federal official. Thus, to increase the maximum punishment by three levels because the victim is a federal official (and the victim could be no one but a federal official under this statute) would be to "double count." Thus, I object to the three level increase in paragraph 21.

As to your calculation of the base offense level, in paragraph 18 of your report, you indicate that you rely on guideline section 1B1.2 as your basis for using the higher offense level. Section 1B1.2 indicates that "the court shall

apply the guideline . . . most applicable to the stipulated offense." 1B1.2(a). This the court is to do in those cases where a conviction is had by a guilty plea "containing a stipulation that specifically establishes a more serious offense than the offense of conviction . . ." *Id.* In fact, in Mr. Braxton's case there is no stipulation. At the time the plea was entered, Assistant United States Attorney Susan Ringler presented to the Court a statement of facts, which the defense acknowledged. There simply was no stipulation in this case. Without a stipulation, section 1B1.2 is inapplicable. *See* section 1B1.2, Application Note one, paragraph 2.

I agree that the Court may consider the entirety of Mr. Braxton's conduct under section 1B1.4, in order to determine the appropriate sentence. Mr. Braxton pled guilty to a five year mandatory consecutive handgun charge (18 U.S.C. § 924(c)), and to assaulting and resisting federal officers under 18 U.S.C. § 111. He maintained his not guilty plea to the attempted murder charge. Given Mr. Braxton's mental condition at the time of this incident (and I remind you he had not taken his psychotropic medication for several months, which precipitated the arrest warrant which was being executed at the time of incident), and given everyone's understanding of what happened, I do not think it appropriate to conclude that Mr. Braxton attempted to murder United States Marshals. I believe it appropriate to conclude that he attempted to remain out of St. Elizabeth's Hospital. In this case, because of exactly when Mr. Braxton discharged his handgun, his actions are more consistent with a desire not to go back to St. Elizabeth's than any desire to murder anyone. In fact, he only discharged the handgun after the door to his apartment had been forcibly kicked open, and then fired at the door, not the doorway. Also, because of the location of some of the bullets found in the apartment, it can be assumed that the handgun was randomly discharged in the direction of the door, and

not at anyone in particular. Again, considering the mental state of the defendant at the time of the incident, I do not think it appropriate to conclude that he attempted to murder United States Marshals. Rather, I think Mr. Braxton was discharging his handgun to frighten away the people who were breaking down his door, because they were going to take him back to St. Elizabeth's. His were the acts of a criminally insane person who had not been taking necessary medication. No one was hurt by his actions and, as you point out several times in your presentence investigation report, other than one person, no one was interested in responding to your queries regarding this incident which, though unusual for us, is certainly not unusual for people who are assigned the task of taking custody of criminally insane persons who have a history of violent behavior and who are not taking necessary psychotropic medication.

In summation, I believe Judge Motz may take account of all of Mr. Braxton's actions when determining the appropriate sentence, when determining whether or not to depart upward or downward. However, I disagree that the base offense level is a 20, or 23. Rather, the base offense level is a 15, under section 2A2.2. Because the statute Mr. Braxton is accused of violating can only apply to a federal official, I would object to any increase under section 3A1.2.

To review, I object to your not finding acceptance of responsibility, I object to your base offense level calculation of level 20, I object to the increase of that level by three points. Rather, I believe the base offense level should be a 15 reduced by two levels, to a level 13. Assuming Mr. Braxton's criminal history is a category two, this would establish a sentencing guideline range of 15-21 months. I agree that Judge Motz may consider all of Mr. Braxton's conduct in determining where within this range to impose sentence, or whether to depart from this range upward or downward.

Lastly, on page 10 of your report, you discuss factors that may warrant a departure. You refer to section 5K2.13 and indicate that the diminished capacity of the defendant may only be used as a basis for a downward departure if the crime committed were non-violent and, as the section states, "the defendant's criminal history does not indicate a need for incarceration to protect the public." Section 5K2.13 is a policy statement and, as such, is not preemptive but merely a guide for the trial court. Section 1B1.7. Actually, I would think section 5K2.12 the more applicable to Mr. Braxton: Coercion and Duress. The section begins by stating: "If the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range." This is exactly Mr. Braxton's case. He did not want to go back to St. Elizabeth's, had stopped taking his psychotropic medication, and was sufficiently mentally insane that St. Elizabeth's, who has possession of Mr. Braxton under a commitment following a not guilty by reason of insanity adjudication on an armed offense in the mid-1970's, determined he should be apprehended and returned to the institution.

I am confident that all of these issues will be resolved at the sentencing proceeding as scheduled.

Based upon our telephone conversation yesterday, it is my understanding that you are not going to change your presentence investigation report, or otherwise amend it, in light of my comments. Thus, in order to facilitate the proceeding scheduled for Monday, July 10, 1989, at 4:00 p.m., I am sending a copy of my objections to Judge Motz, so that I do not have to repeat them orally in open court. It is also my understanding, based upon our telephone conversation, that you will forward to Judge Motz all of the medical records from St. Elizabeth's and Dr. Blumberg which I have previously provided to you.

By copy of this letter, I specifically request that Judge Motz review Dr. Blumberg's report prior to sentencing.

Sincerely,

/s/ S. J. Cribari
STEPHEN J. CRIBARI
Deputy Federal Defender

SJC/mkn

cc: The Honorable J. Frederick Motz
Susan M. Ringler, AUSA

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
PROBATION OFFICE

July 6, 1989

To: Mr. Steven Cribari, Esquire (AFPD) &
Ms. Susan R. Ringler (AUSA)

From: Richard L. Feldman, L.C.S.W.
Senior U.S. Probation Officer

Subject: BRAXTON, THOMAS

Docket No.: JFM-88-0252

Sentencing Date: July 10, 1989

Disclosing Date: July 6, 1989

Dear Counsel:

The Addendum has been completed and is being forwarded to counsel pursuant to the local rule and policy of the court. A copy of the Presentence Investigation Report and Addendum is also being furnished to the court at this time. *No copy of the Addendum will be forwarded to the defendant.* It is the responsibility of defense counsel to disclose the Addendum to the client, and to thoroughly review and discuss same with the client.

If either counsel intends to call any witnesses at the sentencing hearing, they shall submit *in writing*, to the court, opposing counsel and the Probation Officer, a statement containing: (1) the names of the witnesses; (2) a synopsis of their anticipated testimony; and (3) an estimate of the anticipated length of the hearing.

The Addendum is a confidential court document. It may not be copied, reproduced, or further disclosed in any manner. Please do not write on the report. The entire

report must be returned to the Probation Officer immediately after sentencing pursuant to Rule 32(C)(3)(e) and the local policy of the court.

Thank you for your cooperation in the disclosure process.

cc: Court

Richard L. Feldman
Senior U.S. Probation Officer

ADDENDUM TO THE PRESENTENCE REPORT

U.S.A.

v.

THOMAS BRAXTON

Docket No. JFM-88-0252

The Probation Officer certifies that the presentence report, including any revision thereof, has been disclosed to the defendant, his attorney, and counsel for the Government, and that the content of the Addendum has been communicated to counsel. The Addendum fairly states any objections they have made.

OBJECTIONS

By The Government

The Government indicated no objections to the presentence report.

By The Defendant

The defendant, through his counsel, was not able to offer a written objection to the presentence report yet did indicate the following objections.

The defendant objected to the computation of the offense level at the more serious offense of Attempted Murder of a Federal Officer. Furthermore, defense counsel indicated that the defendant should not be penalized by denying two points for acceptance of responsibility because the defendant's mental state did not allow him to appreciate responsibility.

In response to the defendant's objections, the facts of the offense appear to bear out the defendant's intention to kill the U.S. Marshal in order to prevent his apprehension. The guidelines allow for the use of a higher base offense level if a plea of guilty contains a stipulation that specifically establishes a more serious offense than the offense of conviction. The Court, in this case, shall apply the guideline in such chapter most applicable to the stipulated offense. (1B1.2(a).

The essential underlying facts of the offense behavior were stated by the Government at the defendant's rearraignment and at the time that the plea was accepted by the Court. These facts were not disputed by defense counsel except for the amount of time which is said to have elapsed between the two gunshots. Given this situation, although defense counsel did not enter into a formal stipulation as to the more serious offense of Attempted Murder, the offense behavior and accepted statement of facts do weigh heavily in our recommendation that the base offense for the more serious offense be accepted.

It is noted, however, that the Court may decide not to use to the higher base offense level and use the offense of conviction in the guideline computation, should it be ruled that a stipulation does not exist as to the more serious offense or that the defendant's offense behavior does not warrant an upgrade of the base offense level.

With regards to the defendant's objection to not being given credit for a two point reduction for acceptance of responsibility, it is pointed out that defense counselor requested that the Probation Officer not interview the defendant as to the instant offense. Given this situation, the defendant provided no information demonstrating a recognition or affirmative acceptance of personal responsibility for his criminal conduct. Although a guilty plea is said to provide some evidence of the defendant's acceptance of responsibility, it does not by itself, entitle a defendant to a reduced sentence under this section.

The Probation Officer could make no evaluation of the defendant's attitude and therefore he does not appear to qualify for a reduction without demonstrating acceptance of responsibility.

The defendant, through his counsel, also requested that medical reports from St. Elizabeth's Hospital as well as Dr. Blumberg be forwarded to the Court and this will be done prior to sentencing.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
PROBATION OFFICE

July 10, 1989

MEMORANDUM

To: The Honorable J. Frederick Motz
U.S. District Judge

From: Richard L. Feldman, L.C.S.W.
Senior U.S. Probation Officer

Re: U.S.A. v. Thomas Braxton
Criminal No.: JFM-88-025
RESPONSE TO DEFENSE COUNSEL
MEMORANDUM

It is my understanding that the Court was sent a memorandum by defense counsel in the above matter, Steven J. Cribari, in explanation of three areas of objection in the presentence report. Most of the areas discussed by Mr. Cribari were dealt with in the Addendum to the Presentence Report, yet one area is new and I have the following to add.

Defense counsel indicates that the defendant was given three points in Paragraph 21 under Victim Related Adjustments and he concludes that this was improper. As justification for his opinion, Mr. Cribari reflected that the defendant was found guilty of 18:USC:1114 which, as a statute, already takes the victim, as a federal official, into consideration. However, a review of the guideline itself in Section 2A2.2, (Aggravated Assault) or 2A2.1 (Assault With Intent to Commit Murder), reveals that none of the specific offense characteristics in these categories include an adjustment if the victim is a federal official. In fact, the guidelines are set up so that points are subsequently added to the base offense level when

appropriate victim related adjustments are calculated. In effect, the statute under which Mr. Braxton is charged is clearly separate from determining the appropriate victim related adjustments unless the maximum punishment exceeds the statutory maximum punishment allowed.

I am certainly available for any discussion on this or any other matter at the Court's convenience.

RLF:bls

CC: Ms. Susan Ringler (AUSA)
Mr. Steven Cribari (AFPD)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its attorneys, Breckinridge L. Willcox, United States Attorney for the District of Maryland and Susan M. Ringler, Assistant United States Attorney for said District, hereby submits this memorandum in aid of sentencing:

On August 2, 1988, a federal grand jury returned an indictment against Thomas Braxton, charging him with: Count One—attempt to murder Deputy U.S. Marshals in violation of Title 18, U.S.C. Section 1114; Count Two—assault on a federal officer, in violation of Title 18, United States Code, Section 111; and Count Three—use of a firearm during a crime of violence, in violation of Title 18, United States Code Section 924(c). On May 22, 1989, the defendant, without a plea agreement, entered pleas of guilty to Counts Two and Three of the Indictment.

On July 10, 1989, the defendant will come before this Court for sentencing as to Counts Two and Three. Since the offense for which the defendant has admitted his guilt occurred on June 9, 1988, the sentencing guidelines will apply. For the reasons stated herein, it is the government's position that under the unusual circumstances of this case pursuant to Sentencing Guideline Section 1B1.2, the Court, as to Count Two, should apply the offense guideline for attempted murder. That section provides in pertinent part:

> "The Court shall apply the Offense Guidelines Section in Chapter Two (offense conduct) most appli-

cable to the offense of conviction. *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendre* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Court shall apply the guideline at such chapter most applicable to the stipulated offense."

During Mr. Braxton's guilty plea to Counts Two and Three, Mr. Braxton essentially agreed with the statement of facts read by the government.[1] Mr. Braxton has admitted that on June 10, 1988, when four Deputy U.S. Marshals came to his apartment to arrest him in connection with an outstanding arrest warrant from the District of Columbia, he fired through the door opening as the Marshals identified themselves and attempted to gain entry into his apartment. Mr. Braxton further admitted that after firing the shots he stated that he was not coming out—he did not want to go back and if the U.S. Marshals came inside he would kill them/blow their heads off. Mr. Braxton only took issue with the facts by stating that the two shots he fired at the door were fired simultaneously.

As this Court is aware, this is not the first time that Mr. Braxton has been involved in violent conduct. Although more than ten years ago, Mr. Braxton was arrested in 1973 for carrying a deadly weapon. In 1974, he was placed in St. Elizabeth's Hospital after being found not guilty by reason of insanity on a charge of Bank Robbery. In connection with that offense, Mr. Braxton was involved in a shootout with members of the Metropolitan Police Department.

Fourteen years later, while on conditional release from St. Elizabeth's during which he was living in his own apartment and working, Mr. Braxton engages in another

[1] This Statement of Facts is contained in the report prepared by the U.S. Probation Department and therefore will not be repeated herein in its entirety.

violent act by acquiring a firearm and using it against law enforcement officers to resist arrest. While the government is not unmindful of the defendant's psychological problems, it is clear from the defendant's mental status exam performed by Dr. Neil Blumberg, that at the time of his offense, the defendant was able to appreciate the nature, quality and wrongfulness of his acts. Clearly he was not insane under the law at the time of this offense. Given the violent nature of this crime and Dr. Blumberg's assessment of the defendant's mental status, no downward departure is warranted nor permitted under the guidelines.

The conduct which the defendant has admitted to clearly establishes the essential elements of attempted murder: an attempt to unlawfully kill a deputy U.S. Marshall with malice aforethought. Malice aforethought means:

> "An intent, at the time of a killing, willfully to take the life of a human being, *or* an intent willfully to act in callous and wanton disregard of the consequences to human life."

By shooting twice through the doorway opening where the defendant knew the U.S. Marshals stood, Mr. Braxton acted in callous and wanton disregard of the consequences to the lives of those Marshals. One shot lodged in the outside of the door at the door knob level as it was opened and the second shot embedded in the outside of the door at the height of Deputy Jenkins' head as he attempted to gain entry a second time. When the efforts of the U.S. Marshals failed, the area had to be barricaded and secured with the evacuation of nearby buildings. The P.G. County Crisis Intervention Team was called in and it took them several hours to remove the defendant from his apartment. When they arrived he yelled to them: "I want you to come in and get me. I want to kill you." Two additional shots were fired inside the apartment.

The base offense level for attempted murder of a U.S. Marshal, 18 U.S.C. Section 1114 is 20 (2A2.1). While a firearm was discharged during the commission of this offense, the offense level should *not* be increased by five levels due to the fact that the defendant is also pleading guilty to a violation of 18 U.S.C. Section 924(c). *See* 2K2.4. The offense level should be increased by 3 levels since the victims were law enforcement officers (3A1.2). Contrary to Mr. Cribari's arguments, the sentencing guidelines for both sections 1114 and 111 do not take into account the special offense characteristics of the victim who is a law enforcement officer. While the statute discusses the status of the victim, the guidelines for these sections found at 2A2.1. (Attempted Murder) and 2A2.2 (Aggravated Assault) do not. Therefore, 3A1.2 should be applied to increase the offense level by 3 under both sections 1114 and 111. Therefore, under the attempted murder guidelines the total offense level is 23. With respect to Title 18 U.S.C. Section 924(c) (Count Three) a five year term of incarceration must be imposed consecutive to any term of imprisonment imposed as to Count Two.

The maximum sentence as provided by statute for the offenses to which Mr. Braxton has plead guilty are as follows:

Count Two, 18 U.S.C. Section 111—imprisonment for 10 years followed by a term of supervised release not to exceed three years, and a $250,000 fine.

Count Three, imprisonment for five years, followed by a term of supervised release not to exceed three years, and a $250,000 fine. Any sentence of imprisonment imposed under Count Three will be consecutive to any term of imprisonment imposed as to Count Two. Therefore, Mr. Braxton's total exposure in this case is 15 years, followed by a three year term of supervised release and a fine of $500,000. In addition, Mr. Braxton must pay

$100 as a special assessment under 18 U.S.C. Section 3013.

Under these facts, it is the government's recommendation that as to Count Two the defendant be sentenced pursuant to the sentencing guidelines provided for attemped murder of a U.S. Marshal. The government recommends the imposition of a five year term of incarceration as to Count Two, followed by a consecutive five year term of incarceration imposed as to Count Three. This would result in a total sentence of ten years imprisonment. The defendant should not receive the 2 points for acceptance of responsibility since it does not appear from either the Probation Report or the reports from St. Elizabeth's Hospital that he has shown any remorse nor has he recognized the wrongfulness of his actions. Based upon statements of the defendant in the medical records, it appears that Mr. Braxton feels that his actions were justified under these circumstances.

Respectfully submitted,

BRECKINRIDGE L. WILLCOX
United States Attorney

By: /s/ Susan M. Ringler
SUSAN M. RINGLER
Assistant United States Attorney
820 U.S. Courthouse
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Baltimore, Maryland 21201
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(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
EASTERN DIVISION

(Title Omitted in Printing)

Baltimore, Maryland
July 21, 1989

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

* * * *

[3] THE COURT CLERK: Thank you, Your Honor. The government calls the case of the United States versus Thomas Braxton, Criminal Number 88-0252. For purpose of sentencing, it's Counts 2 and 3 of the Indictment.

THE COURT: Do you have any facts, additions or corrections to be made in the—present the Court?

MS. RINGLER: No, I don't, Your Honor.

THE COURT: Mr. Cribari, have you reviewed the present report with Mr. Braxton?

MR. CRIBARI: Yes, Your Honor, we have. I have no additions or corrections to make to that report, other than the objections I noted in my response to Mr. Feldman's report.

THE COURT: Thank you, which are incorporated.

How do you all want to proceed? Do you want to—I see Doctor Blumberg is here. Should I hear from him first?

MR. CRIBARI: Your Honor, because of the issues that I think we're going to address, I have Doctor Blumberg here essentially to answer questions, or to perhaps give opinions at the time they might become appropriate. I do not intend to put him on as a witness and let him speak outside of the context of my remarks.

[4] THE COURT: All right.

MR. CRIBARI: If you'd like to hear from him, you're free to ask him anything you want,—

THE COURT: No.

MR. CRIBARI: —but I don't intend to call him as a witness, but rather to have him answer your questions.

THE COURT: All right, that's fine. Maybe the most appropriate thing is to hear from Ms. Ringler briefly, and then hear Mr. Cribari, and then if Ms. Ringler wants to say something in response, I'll let her do it. And then, Mr. Cribari, I'll let you finish up.

MR. CRIBARI: Thank you, Your Honor.

MS. RINGLER: Your Honor, since I have already submitted a Sentencing Memorandum to the Court, I think the Court is well aware of the government's position in this case, and—

THE COURT: Is your position essentially that it should be sixty-three months—

MS. RINGLER: Our position—

THE COURT: —on the—on the Count 2, and then the consecutive five years?

MS. RINGLER: —yes, it is, Your Honor. And within that, we are arguing, of course, that although Mr. Braxton has pled guilty to the Aggravated Assault in Count 2, that under 1B1.2 of the guideline, this Court has in its [5] discretion, the power to sentence him to the guidelines put for the Attempted Murder, the higher guideline. And under those guidelines, we'd recommend the five-year sentence as to Count 2, with a consecutive five-year sentence for the Gun Charge, which is mandatory under the law. I do—I would like to just briefly address some of the points Mr. Cribari raised in his letter. With respect to whether or not Mr. Braxton should receive the additional three points here because the—

MR. CRIBARI: Your Honor, I'd submit to the court on the legal issue we raised without further argument on that particular point.

MS. RINGLER: That certainly shortens my remarks, Your Honor. We do contend, Your Honor, that Mr. Braxton is not entitled to the two point acceptance of responsibility in this case, since it appears from reviewing (I did have an opportuntiy to briefly review the medical records, which contain comments which he made after he was returned to St. Elizabeth's Hospital, as well as comments he made at the time of this incident, and to law enforcement officers) and it's apparent that Mr. Braxton does not feel that his actions were unjustified, in that he did not want to return to St. Elizabeth's Hospital. If you took that action, which he deemed appropriate, under the circumstances, to prevent or inhibit the law enforcement officers from taking [6] him back to St. Elizabeth's Hospital, I don't see anywhere in any remarks either the probation officer, medical personnel, even an interview with Doctor Blumberg, that this Defendant is remorseful, that he's sorry for what he did, or that he thinks what he did was in reckless disregard for the lives of the U.S. Marshals. It appears that Mr. Braxton continues to maintain he never intended to hurt anyone or kill anyone; he merely wanted them to go away. I would submit to the Court that it's clear from his actions, using a gun to—in response to the efforts of the law enforcement marshal, to get him to use a gun, it certainly shows reckless disregard for the lives of those officers, and I would submit that the two point acceptance of responsibility does not apply to these facts. In addition, with respect to Mr. Cribari's arguments for a downward departure, it appears that Mr. Cribari is essentially trying to argue that a diminished capacity argument, but place that argument in the Court in the context of the exception for coercion and direct, and while that's a clever argument, I find it essentially unpersuasive. I think the guidelines are quite clear as to what—under what circumstances a downward departure would be appropriate. There was no duress here. Mr. Braxton was not legally insane. He had been living out in the community for a

period of years, and he had purchased a [7] handgun, which he used in this case. I think the coercion and direct exception applies to circumstances where, through the acts of another, someone is placed under coercion and duress. In addition, the diminished capacity exception clearly does not apply where there's violent conduct, as there was here. So those would be my comments, unless the Court has any questions.

THE COURT: Thank you. Mr. Cribari?

MR. CRIBARI: Thank you, Your Honor. I'm not arguing over the three points. I'll take whatever ruling Your Honor makes. I think that my essential point was that the statute itself is addressed solely to the instance in this case, and if the guideline doesn't reflect that, the guideline should be interpreted to be in Mr. Braxton's favor, but I will not present argument on that, unless you particularly want to hear that.

THE COURT: No, thank you.

MR. CRIBARI: I assume Your Honor has Mr. Feldman's report and my letter of July 6th, that I wrote to Mr. Feldman, —

THE COURT: Yes.

MR. CRIBARI: —that you have seen Doctor Blumberg's report, you've had access to the medical records, as well as Ms. Ringler's memo in aid of sentencing and so on.

[8] THE COURT: All of those things, and I've reviewed them.

MR. CRIBARI: I—I suppose the first thing I will address is the calculation of the base offense level on the Assault Count. There's no dispute Your Honor has to give five years on the Possession of the Handgun. I know that, Ms. Ringler knows that, you know that. There's—I—there's no argument over that. 1B1.2 is a guideline that can be used where there is a stipulation in the proceedings that take place in Court, and that stipulation establishes a higher offense. We don't have that. If we're going to be specific as to how we use guidelines, then

1B1.2 does not apply. To quote from the guideline, quote, "The Court shall apply the offense guideline in—guideline section in Chapter 2 most applicable to the offensive conviction provided, however, in the case of a conviction by guilty plea containing a stipulation that specifically establishes a more serious offense than the offense of conviction." We don't have that. There is no stipulation here. This was a plea, like every other plea, where we acknowledge the statement of fact, said, that's what happened. Now, let's go to sentencing and argue over sentence. I do agree that under 1B1.3, and under the Due Process Guideline, 1B1.4, Your Honor can consider just about anything in fashioning an appropriate sentence. But [9] at what point do we start with the appropriate sentence? And I submit we start with level 15, which is the base offense level for the assault. Now, of course, my preference is to decrease that by two levels and sentence at a level 13, or to depart below that. I'm not unaware of the merits. I hate to use that word, as a defense lawyer, but I'm not unaware of the merits of the three-level aggravation because we have a federal officer. So assuming that Your Honor is going to rule on that issue against me, I would argue that we start at 15, and we increase to 18. The rest of my argument would be whether or not we now decrease by two levels and get to a level 16, which is twenty-four to thirty months, under Mr. Braxton's criminal history, as opposed to the fifty-one to sixty-three months at a level 23.

Now, as I said, I think Your Honor can consider everything known to you about Mr. Braxton and this event in giving him the sentence, but I think we start at a level 15 or 18, and then we argue over the acceptance of responsibility, concerning which I have some comments, and arrive at the very least, at a level 13—or at a level 16. Your Honor can depart to level 1, if you like, knowing everything you know. If you think you have to increase to a certain level, then you're free to do that. But I think it has to be done that way, rather than [10]

starting at a level 20 and increasing to a level 23, because we don't have the stipulation that 1B1.2 envisions.

Now, of course, at such point—or at such time as Your Honor has questions about this, please, if you want to interrupt or ask or make them at the end, I won't repeat, so I can cover everything as quickly as possible.

Arriving at a level 18, the question then is whether we reduce by two levels. This, for acceptance of responsibility. This is one of the single-most troubling aspects of this case, because I see no way not to reduce by the two levels for acceptance of responsibility. Starting with the guideline, which is 3E1.1, the guideline reads, "If the Defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by two levels." Section—sub-section B says, "This applies after trial, as well as guilty pleas in sub-section C," which is fairly important to Mr. Feldman's position, quote, "A Defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right." Closed quote. Well, that's fine. There—the guideline does not say you can't get a reduction if all you do is plead guilty. It just says you don't automatically get a reduction just because you plead [11] guilty. In my mind, this prevents the person who has been selling large quantities of drugs walking into Court and saying, "Oh, I already plead guilty," and sitting down and getting two points reduction. But that's very different than Mr. Braxton's case. Mr. Braxton has been in and out of St. Elizabeth's since he was twelve years old. Since the mid-seventies, he has been confined to St. Elizabeth's. He is still confined to St. Elizabeth's as a criminally insane resident. Now, he's not insane under this case. The insanity laws have certainly changed in the last few years, since the Hinkley trial, but Your Honor can understand the rather tense discussion Mr. Braxton and I had when I explained to him, you don't have an insanity defense. You're not insane for this case. Question: Well, why

am I in St. Elizabeth's? Answer: Because you're insane. Well, if I'm insane, why don't I have an insanity defense? Well, because you're not insane under the new law; you're insane under the old law, and you're under the old law.

Mr. Feldman, and to some extent, Ms. Ringler, when she says, quote, "Mr. Braxton does not feel his acceptance—does not feel his actions were not justified, that he showed no remorse." Mr. Feldman takes the same position. The probation office, in general, takes the position if you don't show remorse, you haven't [12] accepted responsibility. Now, I absolutely reject the fact that these guidelines and our laws are somehow tied to one's concept of moral responsibility. They may or they may not. But to the extent that the represent moral responsibility, then you have to give back an understanding of an individual because of his moral reaction. The guidelines remove that. Your Honor cannot sit there and say, because of my—I am moved by compassion, because I understand a given Defendant, and where this person is and where this person comes from, and I am moved by this person; I will give this person a certain sentence. You're not allowed to do that anymore. We've got to come up with this great guideline language for departures. But to the extent we have to do that, then there —to that extent, the laws do not reflect a concept of moral accept—righteousness, or moral responsibility. The Supreme Court takes positions like the more morally culpable you are for a murder, the more you are executable. But they don't tell us what morally culpable means. I reject the notion that if you don't show remorse, you are not accepting responsibility for what you do. I've had clients in misdemeanor cases that do 60 on the highway, 65, 80, and the go to Court and plead guilty. Can you imagine someone saying, I'm very remorseful because I was speeding. Now, if you had to do that, nobody would get reductions for [13] that. In front of Judge Ramsey, I had a client who was stopped for reasons that were

irrelevant, ultimately, to the case. May we search your trunk? We think you have contraband in there. Certainly. Opens the trunk. You've got a—a rifle. What's that? Well, that's my 22 rifle. I hunt with that. Well, you're a convicted felon; you can't have a rifle. Oh, well, I guess that's right. Well, that's my rifle. I admit it. They took the rifle. It came to Court. I admitted, this is my rifle; I hunt with it. The probation office argued no acceptance of responsibility. He's not sorry. What has he got to do? What does Mr. Braxton have to do, fall down and say, I'm so sorry for what I did? If he could do that, he would be in St. E's. He wouldn't be where we put people who cannot be responsibile for their actions. He—he's in St. E's. Now, he was given community confinement. Ms. Ringler says he was in the community for some time, and he had a period of years in the community, as if he were living in the community totally adjusted, and he was fine. He went out and bought a gun and shot at the marshals, and this is terrible. Well, what happened was terrible. But that's not the way it happened.

Mr. Braxton lives in the community, and every two weeks goes for a Prolixin injection. And at that time, receives enough Thorazine to take every night [14] until the next two weeks run out. And he goes back to St. E's and he gets another injection. He hadn't had injections or pills for two-and-a-half months. This is a man who, today, takes Prolixin and Thorazine, until they turned off the Thorazine a few days ago because he got in an altercation, and they believe it was a reaction the Thorazine. So they've increased the Prolixin. He takes daily liquid Prolixin. These are behavior-modification drugs. These are drugs for people who are committed to St. Elizabeth's because they're criminally insane and can't be responsibile for their actions. Two-and-a-half months he hasn't taken this stuff. That's why they had the warrant. That's why the marshals had to go and get it. They go—they show up at his apartment, they bang on the

door, "We're here to take you to St. E's," and the facts are clear. "I'm not going back to St. E's. You come in and get me. I'm going to kill you if you come in. I'm not going back to St. E's." So they kicked the door open, and at that time, he discharges the gun. He comes to Court, he pleads guilty, he acknowledges what he did. Now, I didn't let him talk to Mr. Feldman about the version of the offense. I—it's my routine practice that my clients don't talk to probation about that, because no matter what Mr. Braxton said to Mr. Feldman, I have no doubt what Mr. Feldman's report is going to be, because it's always the [15] same. Jacked up the numbers. So that, I stopped that one. But Mr. Braxton has talked to Doctor Blumberg. Doctor Blumberg can address his feelings, or thoughts on acceptance of responsibility. At the end of Ms. Ringler's memo in aid of sentencing, based upon state—this is, quote, "Based—" I'm sorry, let me back up. Page 5 of Ms. Ringler's memo in aid of sentencing, carrying over to page 6, "The Defendant should not receive the two points for acceptance of responsibility since it does not appear from either the probation report or the reports from St. Elizabeth's Hospital that he has shown any remorse. Nor has he recognized the wrongfulness of his actions." If he had not recognized the wrongfulness of his actions in some way, we wouldn't be here in sentencing; we'd be in trial on an insanity defense. That's the test for insanity. Because Doctor Blumberg considered he did and has recognized the wrongfulness of his actions, I can't support an insanity defense. The fact the man pled guilty in this case indicates that he recognized that what he did was wrong, and that he—and he admits to it. But I cannot see how we can deny this man, who's been in and out of St. E's since he was twelve, and has been there permanently, although with periods of community release, for the last fifteen years, how the man can come into Court, say, "I did it," and we can't give him two point [16] reduction for accepting responsibility for what he did. If we

can't give it because he can't show it, then it's not real hard as a defense lawyer to say, he can't show it, because he doesn't have it. And if he doesn't have it, I have an insanity defense, even under the new law. He had psychological treatment in the Army, when he was in the Army.

Well, I can go on over the two points for acceptance of responsibility. If your Honor has questions about whether scientifically, for a psychiatrist, Mr. Braxton can be seen as having demonstrated his acceptance—his acceptance of his responsibility for what he did, then I ask you to ask Doctor Blumberg. The problem is that Mr. Braxton may not think wanting to go back to St. Elizabeth's is wrong. I don't believe he sat there and said, I'm going to kill some marshals. Come on in. Open that door; I'm going to shoot you. I think he sat there saying, I'm not going back to St. E's. You're not taking me there. I've been there for ten years and I'm not going back. And the—the use of the gun, the explosive character of Mr. Braxton in that instance is his statement, I'm not going back to St. E's. Now, it's unfortunate that people may have gotten killed. It's extremely unfortunate. And if someone had not been in St. E's was sitting here, we'd be—we would have pled to Attempted Murder. But [17] that's not what we have, and I—Mr. Braxton, to this day, probably doesn't feel sorry about not wanting to go back to St. E's. That's not a condition for getting two points for acceptance of responsibility. If he said—if his reaction to the marshals was, well, that's all right, I haven't been there in a while; you should take me back, he'd have been going there to get the medication. We have a man who, under the law, is insane. And we're arguing over whether or not he can accept responsibility for what he did. If he can accept responsibility, I'd get him out of St. E's tomorrow. If he can accept responsibility for showing remorse. But for purposes of these guidelines, which I think are unduly harsh and a disgrace to begin with, Mr. Braxton can be seen, and should be seen, as having ac-

cepted responsibility for having the gun. You'll notice there's been no argument over that. No one said he hasn't accepted the responsibility for having the handgun. He's had that. We just don't like the fact that maybe he assaulted marshals, and maybe it didn't amount to Attempted Murder, even though he pulled the trigger on the gun, and therefore he didn't accept responsibility for that. That's sophistic, and I reject that. The man has accepted responsibility.

Now, whether Your Honor should depart below level 16, even without opening my mouth, I'm [18] confident Your Honor knows my position about that. Mr.—Mr. Braxton will get five years, at least, from this Court. He will not get out of St. Elizabeth's within that five years. What will happen is what we have told the Court previously in chambers, but since it's some time previously, I'll put it on the record. He will go back to St. Elizabeth's, and they will then try to give him some kind of grounds privileges or something to adjust where he's kept in the John Howard Pavilion. At that time, the fact that this Court has a detainer on him for service of sentence will register, St. Elizabeth's will then contact this Court, through whatever channel they use, and say, what is there about Mr. Braxton that means we have to treat him differently than we treat everybody else here? And the Court will say, he's got a detainer for jail time. And that St. Elizabeth's, at that point, will institute proceedings to put him in federal custody, because they don't want people they can't treat like every other inmate. They can't do it. He will go to, hopefully, Rochester, Minnesota, or one of the medical centers, where, by the way, he may go anyway, because St. Elizabeth's is trying to affect a transfer of many of its—of its inmates to that facility. He will serve his time there without parole, minus—except for the 54 days a year good time that he can get, and you know as well as I do, that one day he's [19] going to miss medication out at wherever federal institution he's in, and he's going to go off, and

there goes the good time for that year. So he will stay in that place, and then he'll be released back to St. Elizabeth's. So we're looking at at least five years of federal time to begin at some point in the indefinite future, after which he goes back to St. Elizabeth's. The guidelines say you can't—you can only look at Mr. Braxton's diminished capacity if he committed a non-violent offense. If he committed a non-violent offense, no one would care, probably, depending on what it was. We certainly wouldn't be here. The problem is, people in Mr. Braxton's position, who have the diminished capacity, commit violent offenses. That's why they're in the diminished capacity. But you're not allowed to consider that, because the Commission has said, we don't want those people to get a break.

Your Honor can deal with that as you see fit. I know that in—in a case that Mr. Feldman had in front of Judge Smolkin the other day, that involved a diminished capacity history, or a mental—mental capacity issue, Judge Smolkin departed nine levels to give the Defendant a bit of a break. That is not—the facts of that case are not parallel to the facts of this case, but the point is that just because someone can be said to superficially or technically meet the guidelines, doesn't [20] mean we can't manipulate the guidelines in an honorable way to give people a sentence they ought to be getting. I know Your Honor's concerned about that, because it was your due process opinion that the Fourth Circuit has sent back. I have—I'll tell this Court boldly that I have no hesitancy about manipulating the guidelines because the guidelines manipulate my ability to speak for my clients. They tell me that the purpose—the reason you're a defense lawyer to stand with people like Mr. Braxton and speak to the Court that are incapable of speaking, we don't want to hear it, because we don't care. I'll—if the Commission and the Congress and eight members of the Supreme Court are going to say that to me, I'm going to have enough arrogance to say back, well I don't care

either. And if I can manipulate these guidelines to do what I think is right, I'm going to do it. I think what's right in this case is to give Mr. Braxton a five-year sentence, and give him a—an Assault Sentence on the second count. I won't be so—I won't be so arrogant to say probation or two months or something nominal on the Assault Count, because there was an assault, and the marshals were put in jeopardy.

And from Ms. Ringler's position, if I stood on this side of the Courtroom, I would say this man tried to murder marshals, but standing on this side of the [21] Courtroom, I can say, he didn't try to murder anybody. He tried not to go back to St. Elizabeth's. Now, people may have gotten killed, but they didn't. And his use of that gun is what aggravates the assault guideline. I would ask Your Honor to give the five years, followed by nothing worse than a level sixteen. That would be the fifteen plus the three points because there's a Federal Official involved, minus two for acceptance of responsibility, which is sixteen. My preference is the level fifteen as the base offense level, no extra three points, because I think that one can make an ambiguity between the statute and the guideline. The statute is concerned only with an assault on a Federal Official, and it refers you to a guideline and says, that's the guideline for assault on Federal Official. And the way I read that, to enhance by three levels is to say, this is the guideline for an assault on a Federal Official, which we're going to aggravate by three levels because he assaulted a Federal Official. That's ridiculous. I can read it that way. I can read it that way honorably, and I'm going to, in my position, give Mr. Braxton the benefit of that confusion. And I'm going to give him the two points for acceptance of responsibility, and I'm going to come up with a level thirteen, which is what I think I indicated in my response to Mr. Feldman, which in Mr. Braxton's criminal history, is a sentence of [22] fifteen to twenty-one months. I'll ask Your Honor to give Mr. Braxton five

years, followed by fifteen months, and I think Mr. Braxton wants to address the Court after Ms. Ringler responds, if she chooses to do so, and of course, Doctor Blumberg would address the acceptance of responsibility, if you have questions.

THE COURT: I want to hear from Doctor Blumberg, basically on—very briefly on this acceptance of responsibility. You don't have to take the stand, unless Mrs. Ringo—Ringler wants you to.

MS. RINGLER: That's not necessary, Your Honor.

THE COURT: If you want to just tell me what your view is on this?

DOCTOR BLUMBERG: Well, Mr. Braxton acknowledged his involvement in the offense, that yes, he was in fact responsible, or he did fire the gun, giving a fairly detailed rendition of what was going on at that time. From his perspective, he felt justified in using a level of force that he did. Based upon my examination, the primary thought in his mind was that he was not going back to the hospital. But underlying that was the belief, first of all, that he's not mentally ill, and that there is no reason for him to be in the hospital in the first place, which is part of why he was in the hospital. That is the denial of the illness is part of, and typically seen in [23] individuals who are schizophrenic. Here also, at least was in part, delusional thinking about the hospital, which fueled his desire not to return to the outpatient clinic, and not to go back in the hospital. I felt that this played a part in why he was so resistent, although it didn't rise to the level of the other understandable and say rational aspect of he didn't want to go back to the hospital, and he was going to do whatever he could not to. That is, he believed that people in the outpatient department were talking about him, accusing him of having aids, that they might have felt that he was a homosexual. There are a lot of things that are very much wrapped up into his—his illness. I think that to the extent that he's capable, he's acknowledged doing the act that—that was done. But his

illness really prevents him from experiencing remorse because of the distortion of his perception both at that time and—and at the present time. The other thing that might not have as clearly come across in my report as—as I had wanted, is that despite the finding that he does not meet the insanity statute, this is a borderline case and comes close to the—the statutory—statutory limit, but I couldn't go beyond that. There's a delusional component, but that was not the overriding issue, although a significant one. So again, it's not that he is a—clearly a well man who understood [24] all of the implications and was acting out of kind of a basic anti-social attitude, but I see him as a very disturbed man, and that his actions were, at least in a great part, related to his illness, although not to the extent that the statutory guidelines for insanity offenses would—would require.

THE COURT: Thank you very much, doctor.

Ms. Ringler, is there anything you want to say, briefly? I know that Mr. Cribari said he wasn't going to talk about the three points, and he did a little bit anyway. But I understand your argument.

MS. RINGLER: If he—I'm sure the Court understands my argument, and that is basically just that the—the guidelines apply to also all attempted murders. They don't take into consideration the status of the individual who has been victimized. And while the statute does, the guidelines do not, and that is why the three points apply. With respect to whether or not the Court can apply 1B1.2, Mr. Cribari highlighted the statement whether or not there is a guilty plea in there containing a stipulation. I would submit that that section does not purport to state that it only must be a written guilty plea, or that that stipulation must specifically be agreed to in writing by the Defendant. I—if my recollection serves me, I think at the conclusion of the Statement of [25] Fact that was read by me at the time of this guilty plea, the Court asked Mr. Braxton if he agreed with that Statement of Fact, and he said he did, all except for one fact,

that being the order in which the shots were fired at the U.S. Marshals. The word stipulation merely means agreement, and I would submit that if the Court deems that the Defendant has agreed to a greater offense than the Aggravated Assault, that it is within the Court's power to sentence the Defendant under the Attempted Murder guideline.

MR. CRIBARI: Your Honor, may I respond to that?

THE COURT: Yes, you can.

MR. CRIBARI: Thank you. Your Honor, if Mr. Braxton was really stipulating to the fact that he attempted to murder marshals, he would have pled guilty to attempting to murder marshals. He did not. There's a not guilty plea to that count, number one. Number two, the guidelines, not the policy statements, the guidelines are construed as law. And it says, Stipulation. Would you admit a stipulation at a trial not signed by the Defendant? If you would not, then there's no stipulation here. And I—I think it's an extraordinarily dangerous position to take to say that we will imaginatively construe stipulation, because every time anybody pleads guilty, we're going to have a 1B1.2 case, as they acknowledge that [26] what the government says they did, they did. If they're not going to acknowledge that, it's not going to be a guilty plea.

The last thing I would like to read two sentences from Judge Bazalong's (ph) book, "Questioning Authority." Quote. "By declaring a small number not responsible, we emphasize the responsibility of all others who commit crimes." This is in the prologue to the morality and criminal law insanity discussion. Quote. "By cultivating our understanding of these limits, we illuminate and strengthen the moral authority of the criminal law." Closed quote. It is my position that Mr. Braxton is one of those people on the un—the non-responsible side of those limits. Now, the law, as it exists today, the insanity rules, the guidelines, prevent Mr. Braxton from arguing

that, but it does not prevent Your Honor, especially under 1B1.4, if you want the due process guideline, from considering whatever you want in giving a sentence, and you have to consider the fact that Mr. Braxton has been in and out of St. Elizabeth's since 1961, permanently since 1974. Thank you, Your Honor.

THE COURT: All right.

Mr. Braxton, before I impose sentence upon you, I'd be glad to hear anything that you would like to say. You certainly don't have to say anything. I [27] wouldn't hold that against you in any respect. If you want to say anything, I'd be glad to consider that as well.

MR. BRAXTON: Yes, sir, Your Honor. Do you want me to stand? Do you want me to stand?

THE COURT: I think that would probably be best.

MR. BRAXTON: Fine. I'd like to plead, and put my plea in that I pled guilty to the charges, and that I did shoot at the marshals when my door was kicked in, but I was not trying to kill the marshals, harm the marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's. I'm asking the Court for leniency on my behalf, and I'm asking that I be given a suspended sentence with the time served, the fourteen—almost fourteen months served on consideration.

THE COURT: Thank you. Let me state what my sentence is, and state briefly the reasons for it. You don't have to stand up while I do this.

I—on Count 2, I am going to sentence you to the custody of the Attorney General for a period of sixty-three months. And on Count 2,—excuse me, Count 3, add the five years required by law, impose a special assessment of $50 each count, a period of supervised release of three years, no fine. Let me state [28] the reasons for this. I am fully satisfied that under the circumstances of this case, and I won't get into the technicalities whether it's under 1B1.2 or 1B1.3, that I can consider all the conduct

—relevant conduct in setting the offense level and making adjustments. And I realize, and there certainly is no indication, Mr. Cribari's made it absolutely clear throughout that, Mr. Braxton, on your behalf, there's been no stipulation to Attempted Murder, and the record's clear on that. But the facts, as I understand them to be, as set forth and acknowledged at the guilty plea proceeding, and even if it's not acknowledged, as they are, I can consider them under 1B1.3. One cannot, from a legal perspective, and not as a moralist, not as a theologian, not as anything else, from a legal perspective, those facts added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to find an offense level twenty. I may say, and I won't allude to this again because it will just make the proceedings more complex, that if for some reason I was incorrect legally in making and considering those facts and setting the offense level, I would use them to depart under 1B1.4 up to the level where I am—within which I am sentencing. So whether it's deemed, whether I'm technically wrong in considering the facts in setting an offense level, I would say that I would use those same facts to depart to the extent that—[29] that what I'm saying is a departure.

The—legally, I have no doubt that the three points should be added. The specific offense characteristics are not mentioned in the guidelines. I—here the fact that the statute is in this guideline seems to me that it's perfectly clear that the guidelines contemplate that where there is an assault on a Federal Officer, these three points be added, and I think legally, that's just as clear as it could be. So I am then at the level 23. The most difficult question is the question of acceptance and responsibility. And Mr. Cribari has been eloquent in that regard, as he has been in all respects. And he's given Mr. Braxton excellent representation. I approach the acceptance of responsibility question really not in a broad perspective, but in a narrow perspective of what does it mean in the context of the guidelines. And I think that the purpose

of giving the reduction is has the Defendant taken the steps toward rehabilitation, which acceptance of responsibility is the first step toward that? In some cases, that may require no more than a plead of guilty, and in other cases, it may require a show of remorse. And I think that varies from case to case. It is an unfortunate fact in this case, and I understand Mr. Braxton's and Mr. Cribari's—the problem as he poses it, but I think he—he mis-states the [30] problem. The—in Mr. Braxton's case, unfortunately, because of the condition in which Mr. Braxton is, he is unable to take that step, perhaps, towards rehabilitation at that time because he cannot accept responsibility. And I under—I can fully understand the conversation Mr. Cribari had with—with his client back in, you know, why am I in St. E's., and why can't I —why am I insane, and if not, why don't I have an insanity defense here? I understand that from an academic, theoretical perspective, it all seems illogical. But I think if you focus upon the acceptance of responsibility in terms of what the purpose of that—of that reduction is given, unfortunately, Mr. Braxton here cannot appreciate and cannot take that step which acceptance of the responsibility entails and entitles him to the—to the two point reduction. So I, from a—this is not a—not making any moral judgments in the fact that Mr. Braxton hasn't accepted responsibility to the extent that he can. I—I appreciate that, and I think Doctor Blumberg is right, that he has to the extent that he can. Unfortunately, from a legal perspective, the extent that he can is not sufficient to entitle him to—to the two-level reduction, in light of the purpose of that reduction. So that's my sentence and—and the reasons for it.

Let's see, did I forget something?

[31] MS. RINGLER: Is that concurrent?

THE COURT: No, it's consecutive. As a matter of law, the five years on Count Three, has to be consecutive to the sixty-three months on Count 2. Ms. Ringler?

MS. RINGLER: Your Honor, the government would move to dismiss Count One of the Indictment which is pending against Mr. Braxton in this case.

THE COURT: I assume there's no objection to that.

MR. CRIBARI: No objection at all, Your Honor.

THE COURT: And I'll grant that Motion. Anything further?

MS. RINGLER: No, Your Honor.

THE COURT: Thank you.

(End of Sentencing)

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JUL 26 1989
AT BALTIMORE
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY CRIMINAL DEPUTY

United States District Court

FOR THE _____ District of MARYLAND

UNITED STATES OF AMERICA

V.

THOMAS BRAXTON
DEFENDANT NO. 01

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number JFM-88-0252

Susan Ringler, AUSA
ATTORNEY FOR UNITED STATES
Stephen Cribari, AFPD
Defendant's Attorney

THE DEFENDANT:

XX pleaded guilty to count(s) 2 and 3 .
☐ was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18:111 & 2	Assault on a Federal Officer; Aiding and Abetting (Ct. 2)	1
18:924(c) & 2	Use of a Firearm During a Crime of Violence; Aiding and Abetting (Ct. 3)	1

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
XX Count(s) one (1) (is)~~(are)~~ dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
XX It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

JULY 21, 1989
Date of Imposition of Sentence

Defendant's mailing address:

Signature of Judicial Officer
J. FREDERICK MOTZ, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's residence address:

7/24/89
Date

Defendant: THOMAS BRAXTON
Case Number: JFM-88-(2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-three (63) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2.

☐ The Court makes the following recommendations to the Bureau of Prisons:

XX The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,
☐ at _____ a.m. p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: THOMAS BRAXTON
Case Number: JFM-88-0252

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: JFM-88-0252
Case Number: THOMAS BRAXTON

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

I hereby attest and certify on 7/26/89
that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody

JOSEPH A. HAAS
CLERK, U. S. DISTRICT COURT
DISTRICT OF MARYLAND
By Julie M. Stinnett Deputy

84

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

ORDER

Defendant presently being confined at the John Howard Pavillion for the Criminally Insane at St. Elizabeths Hospital in Washington. D.C., and it being this Court's intention that the sentence imposed upon defendant on July 21, 1989 is to run from the date of imposition, it is this 24th day of October 1989

ORDERED that as long as defendant remains confined at the John Howard Pavillion for the Criminally Insane at St. Elizabeths Hospital, that institution is designated as the place of defendant's confinement under this Court's sentence imposed on July 21, 1989.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Court

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 89-5651

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

THOMAS BRAXTON,
Defendant-Appellant.

Argued Feb. 8, 1990

Decided May 8, 1990

CHAPMAN, Circuit Judge:

At sentencing Thomas Braxton was denied a two-level reduction for acceptance of responsibility, because the sentencing judge found that the purpose of acceptance of responsibility was to lead toward rehabilitation, and that because of his mental and emotional condition Braxton could not accept responsibility to the extent necessary to entitle him to the reduction. Appellant claims error because the court found rehabilitation to be a necessary element in its consideration of the request for the reduction. We agree.

Appellant also challenges the district court's use of a base offense level greater than the level applicable to the crimes to which he pled guilty. He claims that it was error to enhance the base offense level in the absence of a stipulation, as provided in § 1B1.2(a), to the more

serious crime of attempted murder. We find that the word "stipulation" as used in this section includes a defendant's oral agreement or acceptance on the record of the government's presentation to the court of facts establishing an offense more serious than his offense of conviction.

Therefore, we affirm the district court's use of the enhanced base offense level, but we reverse and remand for resentencing because of the district court's misinterpretation of the law relating to acceptance of responsibility.

I

In September 1974, Thomas Braxton was confined to St. Elizabeth's Hospital in Washington, D.C., pursuant to a United States District Court order, after he had been found not guilty by reason of insanity on a charge of bank robbery. On May 12, 1988, the United States Marshal for the District of Columbia received an arrest warrant charging Braxton with unauthorized leave from the hospital, and on June 9, 1988, the Marshal's Service found that Braxton was living in Mt. Rainier, Maryland. Early on the morning of June 10, 1988, four deputy marshals went to the Maryland address and determined that Braxton was in Apartment 3. They knocked on the door and advised appellant that they had an arrest warrant for him. There was no response although the deputies could hear movement within the apartment. After the deputies knocked again, identified themselves and unlocked the door, appellant fired a .38 caliber revolver through the door opening. None of the deputies was hit and shortly thereafter appellant fired another round through the doorway. Braxton advised the deputies that he was not coming out and was not going back to the hospital. He threatened to kill them if they came into the apartment. Reinforcements were called and tear gas was used to subdue the appellant and arrest him. Braxton stated after arrest that he knew the United

States Marshals were knocking on his door, and he fired at them because he did not wish to return to the hospital.

At arraignment, defense counsel requested a continuance for approximately eight months to have the appellant evaluated by a psychiatrist to determine his competency and to evaluate whether an insanity defense could be used. In March 1989, defense counsel advised the court that Braxton was competent to stand trial and that he would not be presenting an insanity defense. In May 1989, without the benefit of a plea agreement, appellant pled guilty to Counts 2 and 3 of the indictment, which charged (2) assault on a federal officer in violation of 18 U.S.C. § 111, and (3) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The court conducted the proceeding required by Federal Rule of Criminal Procedure 11 and advised appellant that Count 1, which charged attempt to murder, was still outstanding against him, and as to Counts 2 and 3 he would be sentenced under the sentencing guidelines. After finding that appellant was mentally competent, that he entered the plea voluntarily and without a plea agreement, and that there was a factual basis for the plea, the court accepted the pleas of guilty. The court solicited memoranda from defense counsel and the United States Attorney on the issue of an appropriate sentence. Prior to sentencing, defense counsel filed written objections to the presentence investigation report as it dealt with acceptance of responsibility, victim related adjustments, and the suggested base offense level using the more serious offense of attempted murder.

On July 21, 1989, Braxton was sentenced. Prior to sentencing, all of the pertinent medical records and reports were reviewed by the court. Dr. Neil Blumberg, a psychiatrist who had evaluated appellant at his attorney's request, testified that Braxton was schizophrenic but not insane, and that he should remain in the maximum security inpatient facility at St. Elizabeth's Hospital while serving any sentence. Pursuant to the 1984 Guidelines, Braxton was sentenced to 63 months imprisonment for assaulting a federal officer, to be followed by 60 months incarceration for use of a handgun,[1] and a three-year term of supervised release to commence on release from imprisonment. The government's motion to dismiss Count 1 of the indictment was then granted. During the sentencing, the court denied appellant's request for a two-level reduction for acceptance of responsibility. This denial was based upon the court's finding that due to Braxton's mental illness he could not show remorse for what he had done, and without remorse he could not take the necessary step toward rehabilitation and accept responsibility.

II

Rehabilitation is no longer a purpose for incarcerating a defendant under the federal law. This was made clear when Congress created the United States Sentencing Commission for the purpose of establishing sentencing policies and practices for the Federal Criminal Justice System. At 28 U.S.C. § 994(k), it is stated: "The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of *rehabilitating* the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." (Emphasis added.) In *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 652, 102 L.Ed.2d 714 (1989), the Court found:

> The Act, as adopted, revises the old sentencing process in several ways:
>
> 1. It rejects imprisonment as a means of promoting *rehabilitation*, 28 U.S.C. § 994(k), and

[1] This is a mandatory five-year consecutive sentence. 18 U.S.C. § 924(c).

it states that punishment should serve retributive, educational, deterrent, and incapacitative goals, 18 U.S.C. § 3553(a)(2).

(Emphasis added.)

Acceptance of responsibility is covered in part E of the guidelines and provides:

§ 3E1.1. *Acceptance of Responsibility.*

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilty by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under his section as a matter of right.

Commentary

Application Notes:

1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:

(a) voluntary termination or withdrawal from criminal conduct or associations;

(b) voluntary payment of restitution prior to adjudication of guilt;

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

(d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense; and

(g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutioal challenge to a statute or a challenge to the applicability of a statute to his conduct).

3. A guilty plea may provide some evidence of the defendant's acceptance of responsibility. However, it does not, by itself, entitle a defendant to a reduced sentence under this section.

4. Conduct resulting in an enhancement under § 3C1.1 (Willfully Obstructing or Impeding Proceedings) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review and

should not be disturbed unless it is without foundation.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse.

The availability of a reduction under § 3E1.1 is not controlled by whether the conviction was by trial or plea of guilty. Although a guilty plea may show some evidence of acceptance of responsibility, it does not automatically entitle the defendant to a sentencing adjustment.

In denying the appellant a reduction of acceptance of responsibility, the sentencing court stated:

I approach the acceptance of responsibility question really not in a broad perspective, but in a narrow perspective of what does it mean in the context of the guidelines. And I think that the purpose of giving the reduction is has the defendant taken the steps towards rehabilitation, which acceptance of responsibility is the first step toward that? In some cases, that may require no more than a plead (sic) of guilty, and in other cases, it may require a show of remorse. And I think that varies from case to case. It is an unfortunate fact in this case, and I understand Mr. Braxton's and Mr. Cribari's—the problem as he poses it, but I think he—he mis-states the problem. The—in Mr. Braxton's case, unfortunately, because of the condition in which Mr. Braxton is, he is unable to take that step, perhaps, towards rehabilitation at that time because he cannot accept responsi-

bility. And I under—I can fully understand the conversation Mr. Cribari had with—with his client back in, you know, why am I at St. E's., and why can't I—why am I insane, and if not, why don't I have a insanity defense here? I understand that from an academic, theoretical perspective, it all seems illogical. But I think if you focus upon the acceptance of responsibility in terms of what the purpose of that—of that reduction is given, unfortunately, Mr. Braxton here cannot appreciate and cannot take that step which acceptance of the responsibility entails and entitles him to the—to the two point reduction. So I, from a—this is not a—not making any moral judgments in the fact that Mr. Braxton hasn't accepted responsibility to the extent that he can. I—I appreciate that, and I think Doctor Blumberg is right, that he has to the extent that he can. Unfortunately, *from a legal perspective*, the extent that he can is not sufficient to entitle him to—to the two-level reduction, in light of the purpose of that reduction. So that's my sentence and—and the reasons for it.

(Emphasis added.) The judge's stated reason for refusing the two-level reduction for acceptance of responsibility demonstrates that he understood the law to require that acceptance of responsibility be a step toward rehabilitation and that the purpose of the reduction had rehabilitation as a goal. Nowhere in § 3E1.1, or in the application notes or background commentary, is the word "rehabilitation" mentioned. We have not considered rehabilitation in any of our decisions construing the meaning or application of § 3E1.1. *See United States v. White*, 875 F.2d 427 (4th Cir.1989); *United States v. Urrego-Linares*, 879 F.2d 1234 (4th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 346, 107 L.Ed.2d 334 (1989); *United States v. Harris*, 882 F.2d 902 (4th Cir. 1989).

The guideline for a reduction of sentence is addressed to whether a "defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility

for his criminal conduct." § 3E1.1(a). The district judge has found that Braxton accepted responsibility to the extent that he could. The problem may have been occasioned by the testimony of Dr. Neil Blumberg, a psychiatrist who had examined and evaluated the appellant. According to Dr. Blumberg, appellant acknowledged his involvement in the offense and his responsibility, but felt justified in using force because he did not wish to return to the hospital because he did not feel that he was mentally ill. The doctor found that Braxton was schizophrenic and that Braxton thought people in the hospital were talking about him and accusing him of having AIDS. The psychiatrist stated that Braxton was a borderline case of insanity: "But his illness really prevents him from experiencing remorse because of the distortion of his perception both at that time and—at the present time." Although the trial court accepted this evidence and found that Braxton was sane and had accepted responsibility to the extent that he could, the court misperceived the purpose of the guideline by interjecting into the calculus a need for rehabilitation. This was error, because rehabilitation is not a factor in the consideration of acceptance of responsibility.

We do not hold that Braxton is entitled to a two-level reduction as a matter of law, but we do hold that the sentencing judge erred when he denied the reduction as a matter of law because Braxton could not prove that he was taking steps toward rehabilitation. The sentence as to Count 2 must be set aside and Braxton resentenced. The sentence as to Count 3 is a mandatory five-year minimum consecutive sentence and it is not affected by the district court's error in sentencing on Count 2.

III

Appellant claims additional error by the district judge in applying the base offense level for attempted murder,[2]

[2] The base offense level for attempted murder is 20. § 2A2.1. The base offense level for aggravated assault is 15. § 2A2.2.

because he pled guilty only to aggravated assault of federal officers and to the use of a handgun during a crime of violence, and there was no stipulation to the more serious offense of attempted murder.

In establishing the applicable guidelines, § 1B.12(a) provides:

> Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). *Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two most applicable to the stipulated offense.

The present case is complicated because a plea agreement is not involved. Defendant pled guilty to Counts 2 and 3 of the indictment without any understanding as to what would happen to Count 1. Although this count was dismissed by the government after appellant was sentenced on Counts 2 and 3, there was no agreement that this would be done.

Since there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a stipulation, we are presented with the question of whether § 1B1.2 requires that the stipulation mentioned therein be called "stipulation," or whether a defendant's agreement to the statement of facts by the government can be interpreted as a stipulation for the purposes of establishing a more serious offense than the offense of conviction under § 1B1.2(a).

At various hearings in this matter—arraignment, change of plea, and sentencing—appellant was carefully and clearly instructed that he was subject to the Sen-

tencing Guidelines, and the court would be required to set a sentence pursuant to such guidelines, and that the court would make findings as to the proper base offense level from the evidence presented. It was never a secret that the United States Attorney was treating the offense as attempted murder, and defendant's attorney stated to the district court at sentencing: "There is lurking in the background the allegation of an attempted murder."

Braxton admitted to the court:

> I did shoot at the Marshals when my door was kicked in, but I was not trying to kill the Marshals, harm the Marshals. I was—it was all happening in such a fast instant that the only thing I could think of doing was defending my home and trying to keep them from taking me back to St. Elizabeth's.

At the change of plea hearing, appellant's attorney advised the court that he had explained the guidelines to Braxton and had explained that the court "could depart upward if you think he tried to murder the Marshals." At this same hearing the government made an oral factual presentation to the court in support of the charges against Braxton. This presentation included the firing of the two shots through the doorway while the Marshals were attempting to gain entrance, and it also included the statements of the defendant that he would kill the Marshals if they came inside and that he knew that they were Deputy United States Marshals.

Following this presentation of the facts, Braxton's attorney stated that the facts were accurate, but Braxton thought the two shots were fired almost simultaneously and not at different times. The court then addressed Braxton personally and asked him if the government could prove what it said had actually happened. Braxton answered in the affirmative.

At sentencing the district court found that these facts, which were not in dispute, supported a finding of attempted murder. This finding is subject to a clearly erroneous standard of review, *United States v. Daughtrey*, 874 F.2d 213 (4th Cir.1989), and we conclude that this finding is not clearly erroneous. However, appellant contends that under § 1B1.2(a) the district court cannot use this finding to determine the base offense level because there has not been "a stipulation specifically establishing a more serious offense than the offense of conviction." This issue is complicated by the statement made by the district judge at sentencing that the defendant had not "stipulated" to attempted murder; however, the court went on to find that the facts as acknowledged by Braxton added up to the higher offense of attempted murder.

On the issue of base offense level, the court made the finding:

> I am fully satisfied that under the circumstances of this case, and I won't get into the technicalities whether it's under 1B1.2 or 1B1.3, that I can consider all the conduct—relevant conduct in setting the offense level and making adjustments. And I realize, and there certainly is no indication, Mr. Cribari's made it absolutely clear throughout that, Mr. Braxton, on your behalf, there has been no stipulation to Attempted Murder and the record's clear on that. But the facts, as I understand them to be, as set forth and acknowledged at the guilty plea proceeding, and even if it's not acknowledged, as they are, I can consider them under 1B1.3. One cannot, from a legal perspective, and not as a moralist, not as a theologian, not as anything else, from a legal perspective, those facts added up, in my judgment, to the—to a higher offense, and so therefore, I'm compelled to find an offense level twenty. I may say, and I won't allude to this again because it will just make the proceedings more complex, that if for some reason I was incorrect legally in making and considering those facts and setting the offense level, I

would use them to depart under 1B1.4 up to the level where I am—within which I am sentencing. So whether it's deemed, whether I'm technically wrong in considering the facts in setting an offense level, I would say that I would use those same facts to depart to the extent that—that what I'm saying is a departure.

The—legally, I have no doubt that the three points should be added. The specific offense characteristics are not mentioned in the guidelines. I—here the fact that the statute is in this guideline seems to me that it's perfectly clear that the guidelines contemplate that where there is an assault on a Federal Officer, these three points be added, and I think legally, that's just as clear as it could be. So I am then at the level 23.

Although § 1B1.2 uses the word "stipulation" and the district judge stated that there was "no stipulation to attempted murder," we are persuaded that "stipulation" in § 1B1.2 is not used in a restrictive way so that only an agreement designated as a "stipulation" would comply with the guideline. As used in this section "stipulation" means an agreement as to the facts that specifically establishes a more serious offense than the offense of conviction. There is no requirement in the guidelines or in the commentary or application notes that this stipulation must be in writing. It is only necessary that the facts presented to the court establish a more serious crime and that the defendant agree to the statement of facts.

In the present case, Braxton agreed to the proffer of facts by the government in which he admitted that he fired two shots through the doorway at the marshals, that he said he would kill them if they came in, and that he threatened to kill any additional support personnel called to the scene, if they attempted to come into his apartment. It is the agreement to these facts that qualifies as a stipulation under § 1B1.2, and these facts clearly support the district court's finding of attempted murder. In *United States v. Correa-Vargas*, 860 F.2d 35, 39 (2d Cir.1988), there was no plea agreement with stipulated facts. The defendant entered a plea to use of a communication facility in commission of a drug offense but he did not contest the presentation of facts that showed that 20 kilos of cocaine were involved. The Second Circuit concluded that the sentencing court could consider this information under § 1B1.4 which allows the court to consider any information concerning the background, character and conduct of the defendant in departing from the guidelines, or under § 5K2.0, the policy statement on grounds for departing from the guidelines, or under § 1B1.2 as an offense more serious than the offense of conviction.

In the present case the judge used § 1B1.2, but held that if this was error, he was making the upward adjustment under § 1B1.4.[3]

We find that the district court's use of § 1B1.2 was correct on the present facts.

IV

Appellant objects to the district court's adjustment under § 3A1.2 by a three-point increase in the base offense level because the appellant fired at federal law enforcement officers. This section provides for a three-level increase if: "(a) the victim was a law enforcement or corrections officer . . . and the offense of conviction was

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[3] Section 1B1.4. *Information To Be Used In Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines).*

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. *See* 18 U.S.C. § 3661.

motivated by such status." Braxton argues that under § 2A2.2, aggravated assault has a base offense level of 15, that he was charged under 18 U.S.C. § 111 of assaulting a federal official, and that to increase his level by three would be double counting. We find no merit to this position. We have concluded that the court was correct in using a base offense level of 20 because the agreed facts support a finding of attempted murder. The calculation of this level did not consider the status of the victim, but § 3A1.2 is applicable because the victims were law enforcement officers. It is not necessary that the law enforcement officer be a casualty to be considered a victim, if the defendant knew that the person was a law enforcement officer and assaulted such officer in a manner creating a substantial risk of serious bodily injury. Section 3A1.2(b). These sections fit the facts of the present case and the district judge did not err in his application of the guidelines and in adding three levels to the base offense.

Therefore, we affirm the district court in its use of a base offense level of 20 for attempted murder pursuant to § 1B1.2 and we approved the three-level increase under § 3A1.2 because the victims were law enforcement officers, but we reverse the denial of a two-level reduction for acceptance of responsibility and remand for resentencing without any reference to or consideration of rehabilitation. We express no opinion as to whether a two-level reduction should be granted when this issue is reconsidered.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

SPROUSE, Circuit Judge, concurring in part and dissenting in part:

I concur in Part II of the opinion holding that rehabilitation is not a factor in the consideration of acceptance of responsibility. I respectfully dissent, however, from Part III of the opinion where my brothers hold that Braxton stipulated under a more serious offense thus permitting an enhancement under guideline section 1B1.2. In my view, "stipulation" as it is used in section 1B1.2(a) at least means an agreement between a defendant and the government.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Cr. No. JFM-88-0252

UNITED STATES OF AMERICA

v.

THOMAS BRAXTON

ORDER

[Filed July 31, 1990]

This matter having come before the Court on the motion of the defendant for grounds privileges, and the Court having conducted a hearing in open court on July 26, 1990, and the Court having considered all matters pertinent thereto including the agreement of the United States, it is this 31st day of July, 1990,

ORDERED, that the defendant's motion be and hereby is granted. It is further

ORDERED, that the defendant be permitted to have grounds privileges at St. Elizabeths Hospital, in the discretion of the Hospital authorities. It is further

ORDERED, that Mr. Braxton is not to be released to community custody. It is further

ORDERED, that all prior conditions of sentencing previously imposed on July 21, 1989, and October 24, 1989, remain in full force and effect.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

GUIDELINE RESENTENCING
JUDGMENT AND COMMITMENT

[Filed Sep. 26, 1990]

On the 21st day of July, 1989, came the attorney for the government and the defendant appeared in person and "by counsel."

IT WAS ADJUDGED that the defendant upon a plea of "GUILTY" as to Count Nos. 2 and 3, had been convicted of the offense of Count 2, U.S.C., Title 18, Section 111 & 2—Assault on a Federal Officer; Aiding and Abetting and Count 3, U.S.C., Title 18, Sections 924(c) & 2—Use of a Firearm During a Crime of Violence; Aiding and Abetting, as charged, and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court.

IT WAS ADJUDGED that the defendant was guilty as charged and convicted.

IT WAS ADJUDGED that the defendant be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of sixty-three (63) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2. IT WAS FURTHER ORDERED that the defendant be remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant was placed on supervised release for a term of three (3) years upon terms and conditions.

IT WAS FURTHER ORDERED that Count One was dismissed on the motion of the United States.

IT WAS FURTHER ORDERED that the defendant was to pay a special assessment of $50.00, which was due immediately.

AND WHEREAS on the 5th day of May, 1990, an attested copy of the Order of Judgment of the United States Court of Appeals for the Fourth Circuit was filed in this District Court, it is ordered and adjudged that the judgment of the said District Court appealed from, in this cause, be, and the same hereby, affirmed in part, reversed in part, reversed in part, and the case is remanded to the United States District Court for the District of Maryland, for further proceedings consistent with the opinion.

IT IS ORDERED AND ADJUDGED this 26th day of July, 1990 that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-One (51) months as to Count 2, and five (5) years as to Count 3, to run consecutively to sentence imposed on Count 2 for a total term of imprisonment of One Hundred and Eleven (111) months.

IT IS FURTHER ORDERED AND ADJUDGED that the upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

IT IS FURTHER ORDERED THAT Count 1 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall pay a special assessment of One Hundred ($100.00) Dollars for Counts 2 and 3.

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk deliver two (2) certified copies of this Judgment and Commitment to the U.S. Marshal and that a copy shall serve as commitment of the defendant.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
U.S. District Judge

Dated: September 24, 1990

SUPREME COURT OF THE UNITED STATES

No. 90-5358

THOMAS BRAXTON,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 13, 1990